Supreme Court, U. S.
FILED
JAN 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL McDANIEL, Chief of Police, Jefferson County Division of Police - Petitioners

versus

EDWARD CHARLES DAVIS, III - - Respondent

PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Division of Police - *Petitioners*

v.

EDWARD CHARLES DAVIS, III - - *Respondent*

PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 22, 1974.

OPINION BELOW

The opinion of the Court of Appeals reversed the judgment of the United States District Court for the Western District of Kentucky, and held that the distribution by the Petitioners to a group of local merchants of a flyer captioned "Active Shoplifters" and

containing the name of the Respondent, who had been arrested but not convicted of the crime of shoplifting, was a violation of the Due Process Clause of the Fourteenth Amendment.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 22, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals below err in reversing the judgment of the District Court below and in holding that the distribution by the Petitioners of a flyer for the use and protection of local merchants and business establishments entitled "Active Shoplifters" and containing the identity of the Respondent, who had been charged with, but not convicted of, the crime of shoplifting, was of such grave magnitude as to constitute an invasion of the civil rights secured to the Respondent under the Constitution and to require the invocation of Federal jurisdiction in accordance with 42 U.S.C. Section 1983?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV, Section 1

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATUTES INVOLVED

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. Section 2201

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other relation of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. Section 2202

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

STATEMENT OF THE CASE

The Respondent, Edward Charles Davis III, filed suit on December 13, 1972, in the United States District Court for the Western District of Kentucky under 28 U.S.C. Sections 1343(3) (4), 2201, and 2202, and 42 U.S.C. Section 1983, alleging a deprivation of his civil rights in general and violation of his right of privacy specifically. The Respondent's suit was brought

against the Petitioners, Edgar Paul, who was Chief of Police of the Louisville Division of Police at the time the Respondent's claim arose, and Russell McDaniel, who was the Chief of Police of the Jefferson County Police Department both at the time the Respondent's claim arose and presently.

The Respondent was arrested on June 14, 1971, by private security officers and charged with a violation of Kentucky Revised Statutes 433.234, Shoplifting. On September 21, 1971, the case against the Respondent was "filed away with leave". On December 11, 1972, nearly nineteen (19) months after the case was filed away, the Respondent's case in Police Court was dismissed.

On or about December 5, 1972, the Petitioners authorized the preparation and dissemination to certain local merchants and business establishments in Jefferson County, Kentucky, a flyer containing names and photographs of persons suspected of being active shoplifters in the area. The purpose of the flyer was not to inform the public at large, but rather to alert local businessmen so that they in turn could alert their security personnel to watch for these subjects. The flyer further stated that the persons contained therein had been arrested during 1971 and 1972 and charged with the crime of shoplifting.

On December 12, 1972, the instant action was initiated in the United States District Court for the Western District of Kentucky as a class action, alleging as unconstitutional the distribution of the aforementioned flyers. Furthermore, the Respondent demanded compensatory and punitive damages against the Petitioners. The Respondent based his claim for damages upon the theory that the Petitionrs had deprived him of his constitutional right to privacy. On January 8, 1973, the District Court held a hearing on the Respondent's motion for a preliminary injunction. The District Court thereafter denied the Respondent's motion. On November 16, 1973, the District Court entered its judgment dismissing the Respondent's suit. (See Appendix A).

Subsequently, the Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On October 22, 1974, the Court of Appeals reversed the District Court's judgment and remanded the case for further proceedings (See Appendix B). In so doing, the Court of Appeals held that the Respondent's claim did, in fact, allege a violation of rights guaranteed by the Constitution. It is from the judgment of the Court of Appeals below that the Petitioners make application for a Writ of Certiorari.

REASON FOR GRANTING THE WRIT

I

This Court Should Grant Certiorari to Consider Whether the Court of Appeals Below Erred in Reversing the Judgment of the District Court Below and in Holding That the Distribution by the Petitioners of a Flyer for the Use and Protection of Local Merchants and Business Establishments Entitled "Active Shoplifters" and Containing the Identity of the Respondent, Who Had Been Charged With, But Not Convicted of, the Crime of Shoplifting, Was of Such Grave Magnitude as to Constitute an Invasion of the Civil Rights Secured to the Respondent Under the Constitution and to Require the Invocation of Federal Jurisdiction in Accordance With 42 U.S.C. Section 1983.

The Court of Appeals below held that the actions taken by the Petitioners violated the Respondent's constitutional right of privacy and deprived him of his right to due process guaranteed by the Fourteenth Amendment. The Petitioners respectfully disagree with that ruling. It shall be the Petitioners' contention that the claim advanced by the Respondent constitutes nothing more than a potential tort case for defamation of character or invasion of privacy for which the proper remedy is a civil suit in the state court.

In rendering its decision, the Court of Appeals below relied heavily on this Court's ruling in *Wisconsin* v. *Constantineau,* 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971). In that case, this Court, by a six to three majority, held a Wisconsin statute to be unconstitutional which provided that a police chief, among others, could forbid in writing the sale or gift of alcoholic beverages to one who, by excessive drinking, exhibited certain traits. Furthermore, pursuant to that statute, a police chief, without granting any advance notice or opportunity to be heard, caused to be posted in all local retail liquor outlets a notice forbidding sales or gifts of liquor to the appellee.

In short, the *Constantineau* case involved the unconstitutionality of a state statute which deprived a person of any remnant of a due process hearing prior to the taking of official action in accordance with the procedures set forth in the statute. This is quite different from the actions undertaken in the case at bar. Herein, the Petitioners were not directed by any statute, regulation, or ordinance to take any action whatsoever relative to the preparation and dissemination of the flyer in question. They did so independently of any directions or authority. In so doing, they acted alone.

As a result of their independent actions, they may have invaded the Respondent's privacy. They may have defamed him. Their actions may have been tortious in nature. If so (and we certainly do not admit that said acts do constitute any tort), then the Respondent's proper remedy is a civil action for injunctive relief and/or damages in the appropriate state court. The Petitioners respectfuly submit that a person is not entitled to a full due process hearing *before* something of a potentially defamatory nature is said or written about him.

Contrary to the holding of the Court of Appeals below, the Petitioners respectfully urge that their actions did not constitute a violation of the Respondent's constitutionally protected right to privacy. It should be pointed out that our Constitution makes no mention of any specific right of privacy. In fact, it has long been established that one's right of privacy sounds in tort and gives rise to a common law cause of action in its own name. Warren and Brandeis, "Right to Privacy", 4 Harv. L. Rev. 193 (1890).

However, in *Griswold* v. *Connecticut,* 381 U. S. 479, 14 L. Ed. 2d 510, 89 S. Ct. 1678 (1965), this Court acknowledged that a right of privacy could attain constitutional stature in certain limited instances. In *Griswold,* this Court was confronted with a challenge to a state law prohibiting the use of contraceptives by married couples. In holding that statute to be unconstitutional, the Court determined that the "sacred" nature of the marital relationship was imbued with "a right of privacy older than the Bill of Rights". 381 U.S. 479 at 486. Furthermore, the Court concluded that the rights protected in general by the first ten amendments to the Constitution and more specifically by the First, Fourth, Fifth and Ninth Amendments have certain penumbras which create zones of privacy.

The Respondent would have us believe that the actions taken by the Petitioners in the case at bar fall within the zones of privacy recognized in *Griswold.* A similar contention was raised and defeated in *Travers* v. *Paton,* 261 F. Supp. 110 (D.C. Conn. 1966).

In that case, the plaintiff was a convict who contended that the defendants violated his constitutional right of privacy by televising his parole hearing without his prior knowledge or approval. In holding that the defendants' actions did not constitute a violation of the plaintiff's constitutional right of privacy or any other civil rights afforded under 42 U.S.C. Section 1983 the District Court pointed out that the plaintiff's claim more properly sounded in tort law. Furthermore, they ruled that "all torts are not violations of rights secured by the Constitution and laws" and that 42 U.S.C. Section 1983 "encompasses a much narrower field" than the type of action raised by the plaintiff. 261 F. Supp. 110, at 112. In addressing itself to the *Griswold* decision, the District Court in *Travers* stated:

> "It misses the heart and spirit of the *Griswold* case to casually infer an intent to adopt into the Constitution the entire body of the tort law right to privacy." 261 F. Supp. 110, at 113.

To date, only the basic core elements of privacy have been held as clearly protected by the Constitution. (See *Mapp* v. *Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), wherein the Fourth Amendment right to be free from unauthorized searches by police was held applicable to the state by the Due Process Clause of the Fourteenth Amendment; *Rochin* v. *California,* 342 U. S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), holding that one's person is protected against bodily intrusion by means of a stomach pump in that such intrusion "shocks the conscience"; *Roe* v. *Wade,*

410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) holding that the federally protected right of privacy encompassed a woman's decision as to whether she desired to terminate her pregnancy.) To hold that the claim made by the Respondent in the case at bar amounts to a violation of his right to privacy as protected by the Constitution would open the proverbial floodgates of litigation to virtually all types of tort actions sounding in defamation of character or invasion of privacy.

Federal jurisdiction under 42 U.S.C. Section 1983 attaches as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Actions for defamation do not come within the purview of 42 U.S.C. Section 1983. *Jervey* v. *Martin,* 336 F. Supp. 1350 (W.D. Va. 1972). Where only an invasion of a general personal right to privacy is warranted under the facts, the Respondent cannot rely upon the Constitution as the source of that right in an attempt to plead his way into the jurisdiction of the federal courts.

> "There are many individual rights which are not guaranteed by the Constitution of the United States. Protection of those rights is the duty of the State . . . these include the right to be secure from intentional and unintentional harm to a person's reputation and property. The fact that such rights are violated by policemen does not spell out Federal Constitutional violations." *Johnson* v. *Hackett,* 284 F. Supp. 933, at 939 and 940 (E.D. Pa. 1968).
>
> ". . . the protection of a person's *general* right to privacy—his right to be left alone by other people—is like the protection of his property and his very life, left largely to the law of the individual states." *Katz* v. *United States,* 389 U. S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

In a case somewhat similar to the one at bar, the Ninth Circuit held that the plaintiff failed to allege facts which, if proven, would establish that he had been deprived of any right secured by the Constitution. *Baker* v. *Howard,* 419 F. 2d 376 (9th Cir. 1969). In that case, the actions of the defendant police officers went further than the actions of the Petitioners herein. After investigating a "suspicious incident" involving the appellant in that case, which apparently did not result in any arrest, the police officers released statements to a local radio station indicating that the appellant therein had committed a crime. The radio station, also a party defendant, then broadcast the reports to the community at large. The combined police and radio station conduct directly resulted in the loss of the appellant's teaching position. The Ninth Circuit upheld the District Court's dismissal of the case due to a failure to state a claim under either 42 U.S.C. Sec-

tion 1983 or 28 U.S.C. Section 1343. In so doing, the Circuit Court held:

> "Under some circumstances, there can be such a gross abuse of privacy as to amount to an abridgement of fundamental constitutional guarantees . . . but the invasion of privacy here complained of is not, in our opinion, so flagrant that it calls for the invocation of the Constitution." 419 F. 2d 376, at 377.

The acts of the police officers in *Baker,* if true as alleged, were far more potentially determinental to that plaintiff than the Respondent in the case at bar. In the instant case, the allegedly damaging information was disseminated in a limited number of pamphlets listing the Respondent as one of a number of "Active Shoplifters". In *Baker,* the dissemination of the defamatory information occurred over a vast communication media aimed at the entire community at large. Further, in *Baker,* the plaintiff was deprived of his job. No such loss is alleged by the Respondent in the instant case. If the actions in *Baker* did not give rise to the invocation of rights protected by the Constitution and/or the jurisdiction of the Federal Courts granted under 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343, then it seems unreasonable to extend said rights and protections to the claims asserted by the Respondent herein. As pointed out by the decision of the District Court below in the instant case:

> "Even if the police departments fail to use the proper caution in screening their records, the acts complained of, as in *Baker,* supra, are not, under

> the particular circumstances, sufficient to invoke the Constitution. The facts alleged in this case do not establish that plaintiff has been deprived of any right secured to him by the Constitution of the United States."

CONCLUSION

It is respectfully submitted that this Court should grant certiorari to review the erroneous judgment of the Court of Appeals below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 7502-B

EDWARD CHARLES DAVIS, III - - - *Plaintiff*

v.

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Police - - - - - - *Defendants*

MEMORANDUM AND ORDER

This is an action brought under 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983 to redress the alleged violation of plaintiff's right of privacy as protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. The defendants, pursuant to Rule 12(b), Federal Rules of Civil Procedure, have moved to dismiss the plaintiff's complaint on the grounds that this Court lacks jurisdiction over the subject matter and that the plaintiff has failed to state a claim upon which relief can be granted.

Plaintiff contends that his constitutionally protected right of privacy has been violated by the acts of the Louisville and Jefferson County Police Departments. The acts complained of are the dissemination by the named police departments of flyers containing the names and pictures of

persons the departments arrested for shoplifting during 1971 and 1972. Although plaintiff was arrested in 1971 as a suspected shoplifter, he contends that since he was never convicted of the charge, his right of privacy was violated by the dissemination of the flyers, containing his name and picture and entitled "active shoplifters", to local businessmen and merchants.

Plaintiff argues that the defendants acted under color of state law and in so doing have violated his rights, privileges and immunities protected under the Constitution. 42 U.S.C. §1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The question which this Court must consider is whether the defendants have violated any constitutionally protected rights, privileges, or immunities of this plaintiff which would give the Court jurisdiction over this matter.

The leading case on this question of the constitutional right of privacy is *Griswold* v. *State of Connecticut,* 381 U. S. 479, 89 S. Ct. 1678 (1965) which involved the challenge of a state law prohibiting the use of contraceptives. The Court held the statute unconstitutional; however, it proffered several different reasons for the decision. The majority opinion recognized that the Constitution does not explicitly mention a right of privacy, but theorized that the rights protected by the first ten amendments have "penumbras" which create "zones of privacy" in which the marital

relationship is included. A concurring opinion in that case classified marital privacy as a "fundamental right" protected by the Ninth Amendment. The Court alluded that it felt the marital sexual relationship is a special situation and is private by nature. See *United States* v. *Laub Baking Co.,* 283 F. Supp. 217 (1968).

In *Travers* v. *Paton,* 261 F. Supp. 110 (1966), the Court dealt with the question of whether the televising of a parole hearing was a violation of the plaintiff's civil rights under 42 U.S.C. §1983 and held that it was not. The Court there pointed out that "all torts are not violations of rights 'secured by the Constitution and laws'. The statute encompasses a much narrower field". In order for the statute (42 U.S.C. §1983) to apply, there must be an act in violation of the Constitution or a federal law. See *Bomar* v. *Keyes,* 162 F. 2d 136 (2nd Cir., 1947). The Court went further and commented on *Griswold,* supra, stating:

> "It misses the heart and spirit of the Griswold case to casually infer an intent to adopt into the Constitution the entire body of the tort law right of privacy."

In *Baker* v. *Howard,* 419 F. 2d 376 (9th Cir., 1969), a case similar to the one at bar, the Court held that there was no violation of any Constitutionally secured right of privacy. The defendant police officers, after investigating a "suspicious incident" involving plaintiff and concluding that no crime had been committed, deliberately released to a broadcasting company a police report containing "libelous and false statements" suggesting that plaintiff had committed a crime. The Court held that the complained invasion of plaintiff's privacy was not so flagrant as to invoke the Constitution.

The Court, in *Mapp* v. *Ohio,* 367 U. S. 643, 81 S. Ct. 1684 (1961), held that the Fourth Amendment to the Constitution secured only the basic core aspects of privacy and

through the Fourteenth Amendment have been held applicable to the states by the due process clause. The Court held, however, that this core of privacy was fundamental in nature, such as the right to be secure in one's home against violent intrusion by the police.

Thus, it appears that constitutional protection of the right of privacy does not extend to all possible ramifications of privacy but must be scrutinized carefully to not indiscriminately extend federal jurisdiction over state torts under the protection of §1983.

In the present case, the dissemination of the flyers was not to the public at large but only to businessmen and merchants in the community in order for them to distribute the information to their security personnel to help them identify possible shoplifters. See *Tosh* v. *Buddies Supermarkets, Inc., et al.*, 482 F. 2d 329 (5th Cir., 1973). Even if the police departments failed to use the proper caution in screening their records, the acts complained of, as in *Baker*, supra, are not, under the particular circumstances sufficient to invoke the Constitution. The facts alleged in this case do not establish that plaintiff has been deprived of any right secured to him by the Constitution of the United States.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the plaintiff's complaint be and is hereby dismissed, at the cost of plaintiff.

Judgment shall be entered accordingly.

This 16th day of November, 1973.

(s) Rhodes Bratcher
United States District Judge

Copies to:
Counsel of record.

APPENDIX B

No. 74-1225

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD CHARLES DAVIS, III, - *Plaintiff-Appellant,*

v.

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Police, - - - *Defendants-Appellees.*

Appeal From the United States District Court For the Western District of Kentucky.

Decided and Filed October 22, 1974.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and ENGLE, Circuit Judges.

PHILLIPS, Chief Judge. Appellant, Edward Charles Davis, III, brought this class action under 42 U.S.C. §1983 alleging that the distribution by the Chiefs of Police of the Louisville and Jefferson County Police Department of a flyer captioned "Active Shoplifters" and containing the names and mugshots of persons who have never been convicted of shoplifting violated the Due Process Clause of

the Fourteenth Amendment. Appellant seeks declaratory, injunctive and monetary relief. The District Court dismissed the complaint, holding that it did not allege any violation of rights guaranteed by the Constitution. We reverse.

The complaint asserts that on June 14, 1971, Edward Charles Davis, III, was arrested in Louisville, Kentucky, on a charge of shoplifting. It is alleged, and attachments to the complaint show, that he entered a plea of not guilty and that the charge was "filed away" on September 21, 1971, and dismissed on December 11, 1972. It is further alleged that appellant is innocent of the charge and that he was never tried or convicted of the offense.

The complaint alleges that on December 5, 1972, Col. Edgar Paul, Chief of Police of the Louisville Division of Police, and Col. Russell McDaniel, Chief of Police of the Jefferson County Police (hereinafter Police Chiefs), caused to be sent flyers to numerous merchants and business establishments in the Louisville Metropolitan area. It is alleged, and attachments to the complaint show, that the flyers contained the names and mugshots of persons who had been arrested for shoplifting during 1971 and 1972 or who were active in various criminal fields in high density shopping areas, that each flyer was headed by the caption "Active Shoplifters" and that the stated purpose of the flyer was to allow the merchants to inform their security personnel "to watch for these subjects."[1] Appellant's name and mugshot were included in the flyer. It is alleged that the acts of the Police Chiefs were under color of

[1]At the hearing on the motion for a preliminary injunction, Col. Paul testified that this practice had been going on about fifteen years, that the sole justification for including a person in the flyer is the fact of an arrest and information supplied by the arresting officer, that appellant's only prior arrest was in 1967 for a speeding violation and that about 800 of the flyers had been distributed.

the state law and deprived the appellants and other similarly situated of rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

The Police Chiefs moved to dismiss for lack of subject matter jurisdiction. The District Court dismissed the complaint stating: "The facts alleged in this case do not establish that plaintiff has been deprived of any right secured by the Constitution of the United States."

On considering an appeal from an order granting a motion to dismiss, we must, of course, take the allegations in the complaint as true. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 515-16 (1972).

Before recovery can be allowed under §1983, two elements must be present.

> "First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'" (Footnote omitted) *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 150 (1970).

The sole issue on appeal, as it was in the District Court, concerns the first two elements set forth in the preceding paragraph. Specifically, the Police Chiefs contend that the complaint only states a cause of action for defamation and does not establish a constitutional deprivation.[2] Ap-

[2]"It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked" *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961).

pellant contends that the complaint sets forth facts showing a deprivation of due process as guaranteed by the Fourteenth Amendment. Specifically, appellant contends that the Due Process Clause prohibits the Police Chiefs from disseminating "to large segments of the public, flyers containing the names and photographs of persons who have been arrested for, but not convicted of, the offense of shoplifting and describing these persons as 'active shoplifters,' together with persons who have been convicted of the offense." At oral argument, counsel for appellant stressed that the heart of the deprivation was the use of the label "active shoplifter."

We are of the view that appellant has set forth a claim cognizable under §1983 in that he has alleged facts that constitute a denial of due process of law. This holding is mandated in view of *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971).

In *Constantineau,* the question presented to the Supreme Court involved the constitutionality of a Wisconsin statute which provided that designated persons could in writing forbid the sale or gift of intoxicating liquors to excessive drinkers who exhibited specified traits or produced described conditions. The statute did not provide for notice and hearing. The Chief of Police, pursuant to the statute and without notice or hearing, caused to be posted a notice at all retail liquor outlets in the town that sales or gifts of liquor to Constantineau were forbidden for one year. The precise issue presented to the Court was "whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard." 400 U. S. at 436. In holding that due process was required, the Court stated:

> "Yet certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play.

Wieman v. *Updegraff,* 344 U. S. 183, 191. '[T]he right to be heard before being condemned to suffer grevious loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 168 (Frankfurter, J., concurring).

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. 'Posting' under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." 400 U. S. at 437.

In the teeth of the plain language of the Court's holding, the Police Chiefs seek to distinguish *Constantineau* on the basis of an artificial distinction between "liberty" and "property" rights. It is contended that the thrust of the holding was based on the denial of a property right, i.e., the ability to purchase liquor. We do not read the opinion of the Supreme Court to support any such distinction. The Court has rejected the distinction between interests in "liberty" and "property" in the context of a due process deprivation. *Board of Regents* v. *Roth,* 408 U. S. 564, 569-75 (1972); *Perry* v. *Sindermann,* 408 U. S. 593, 599 (1972).

In *Roth,* the Court reaffirmed its holding in *Constantineau* and emphasized that when interests in liberty are involved, due process is required. Although the Court did not

undertake to define liberty in precise terms, it was stated that its meaning must "[w]ithout doubt, . . . [denote] not merely freedom from bodily restraint," and "must be broad indeed." 408 U.S. at 572. There is no question that the acts complained of in the case at bar constitute a denial of an interest in liberty. As stated by the Court in *Roth:*

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437. *Wieman* v. *Updegraff,* 344 U. S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123; *United States* v. *Lovett,* 328 U. S. 303, 316-317; *Peters* v. *Hobby,* 349 U. S. 331, 352 (DOUGLAS, J., concurring). See *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.
>
> "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." (Footnote omitted.) 408 U.S. at 573.

In the case at bar, appellant alleges that he and others have been branded as active shoplifters—common criminals

—and grouped together with those who have been convicted of crimes. This label carries with it the badge of disgrace of a criminal conviction. Moreover, it is a direct statement by law enforcement officials that the persons included in the flyer are presently pursuing an active course of criminal conduct. All of this was done without the slightest regard for due process. There was no notice nor opportunity to be heard prior to the distribution of the flyer, and appellant and others have never been accorded the opportunity to refute the charges in a criminal proceeding. It goes without saying that the Police Chiefs cannot determine the guilt or innocence of an accused in an administrative proceeding. Such a determination can be made only in a court of law.

The harm is all the more apparent because the branding has been done by law enforcement officials with the full power, prestige and authority of their positions. There can be little doubt that a person's standing and associations in the community have been damaged seriously when law enforcement officials brand him an active shoplifter, accuse him of a continuing course of criminal conduct, group him with criminals and distribute his name and photograph to the merchants and businessmen of the community. Such acts are a direct and devastating attack on the good name, reputation, honor and integrity of the person involved. The fact of an arrest without more may impair or cloud a person's reputation. *Michelson* v. *United States,* 335 U.S. 469, 482 (1948). Such acts on the part of law enforcement officials may result in direct enocomic loss and restricted opportunities for schooling, employment and professional licenses. *Menard* v. *Mitchell,* 430 F. 2d 486, 490 (D.C. Cir. 1970).

In the present case, appellant was a photographer for the Louisville-Courier Journal at the time of the flyer's dissemination. At the hearing on the motion for a preliminary injunction, his supervisor testified as follows:

> "Our photographers must be accepted as a reasonably honorable and truthful man wherever they go. I felt that in view of this flyer's circulation to merchants of the community I could not, for example, assign Mr. Davis to photographing anything in a merchantile establishment and so that should such an assignment come up I would have been forced to have someone else cover that assignment rather than Mr. Davis."

His supervisor also stated appellant "had best not find himself in a similar situation" again and that he would "view very seriously" a subsequent arrest.

"The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." (Footnote omitted.) *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 241 (1957). In *Schware* the Court found a denial of due process when a state denied an applicant a license to practice law based on reasons that had no probative value. *Id.* at 246-47. Part of the Board's evidence was based on prior arrests for which the applicant had never been tried or convicted. *Id.* at 241-43.

Similarly, law enforcement officials cannot, consistent with the Due Process Clause, brand a person as an active shoplifter when he has never been tried for the offense. There is no rational basis to presume guilt and active criminality from the mere fact of an arrest. While "[p]rocedure by presumption is always cheaper and easier than individualized determination," it cannot stand when it results in the deprivation of a protected interest without a meaningful opportunity to rebut the presumption. *Stanley* v. *Illinois,* 405 U.S. 645, 656-57 (1972).

Few things are as fundamental to our legal system as the presumption of innocence until overcome by proof of guilt

beyond a reasonable doubt at a fair trial. The dissemination of the flyer in the case at bar is in the face of the presumption of innocence, disregards the Due Process Clause and is based on evidence that is not probative of guilt.

Condemning a man to a suspect class without a trial and on a wholly impermissible standard, as in the case at bar, offends the very essence of the Due Process Clause, i.e., protection of the individual against arbitrary action. *Slochower* v. *Board of Education,* 350 U.S. 551, 559 (1956); *Peters* v. *Hobby,* 349 U.S. 331, 351-52 (1955) (Douglas, J., concurring.) As said by Mr. Justice Black in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 144-45 (1951):

> "Our basic law, however, wisely withheld authority for resort to executive . . . condemnations and blacklists as a substitute for imposition of legal types of penalties by courts following trial and conviction in accordance with procedural safeguards of the Bill of Rights." (Footnote omitted.)

Reversed and remanded for proceedings not inconsistent with this opinion.

CERTIFICATE OF SERVICE

I, J. Bruce Miller, one of the attorneys for Russell McDaniel, Petitioner herein, acting on behalf of all counsel for both Edgar Paul and Russell McDaniel, and being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of January, 1975, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on Edward Charles Davis, III, Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid, to his respective attorneys of record, as follows:

Daniel T. Taylor, III
P. O. Box 1282
Louisville, Kentucky 40201

Robert Allen Sedler
P. O. Box 862
University Station
Lexington, Kentucky 40506

William H. Allison, Jr.
3208 West Broadway
Louisville, Kentucky 40211

J. Bruce Miller

J. BRUCE MILLER
1112 Kentucky Home Life Building
Louisville, Kentucky 40202

Supreme Court, U. S.
FILED
MAY 29 1975
JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL McDANIEL, Chief of Police, Jefferson County Division of Police - Petitioners

versus

EDWARD CHARLES DAVIS, III - - Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CERTIORARI GRANTED APRIL 14, 1975

APPENDIX

J. BRUCE MILLER
1112 Kentucky Home Life Building
Louisville, Kentucky 40202
Attorney for Petitioner, McDaniel

EUGENE L. MOSLEY
1600 Kentucky Home Life Building
Louisville, Kentucky 40202
Attorney for Petitioner, McDaniel

BURT J. DEUTSCH
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200 City Hall
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Louisville, Kentucky 40202
Attorney for Petitioner, Paul

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Louisville, Kentucky 40202
Attorney for Petitioner, Paul

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

EDWARD CHARLES DAVIS, III, *Plaintiff*

v.

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Police, *Defendants*

Civil Action No. 7502-B

COMPLAINT

Plaintiff, for his complaint, alleges as follows:

1. The jurisdiction of this Court arises under Title 28 U.S.C. §§ 1343(3)(4), 2201, 2202, and Title 42 U.S.C. § 1983. This is a proceeding to redress the violation of rights guaranteed to the plaintiff by the Constitution of the United States, in particular, the right of privacy, which is protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to said Constitution, and the right to due process of law, which is guaranteed by the Fourteenth Amendment to said Constitution.

2. Plaintiff EDWARD CHARLES DAVIS, III, is a citizen of the United States and the Commonwealth of Kentucky, currently residing at 3218 Virginia Avenue, Louisville, Kentucky.

3. Defendant EDGAR PAUL is the duly-constituted and acting Chief of Police of the Louisville Division of Police, and all acts of said defendant described herein were taken under color of state law and by virtue of the authority vested in him in his capacity as Chief of Police of Louisville Division of Police.

4. Defendant RUSSELL MCDANIEL is the duly-constituted and acting Chief of Police, Jefferson County Police, and all acts of said defendant described herein were taken under color of state law and by virtue of the authority vested in him in his capacity as Chief of Police, Jefferson County Police.

5. Plaintiff DAVIS sues on behalf of himself and all persons similarly situated to wit, persons whose names and photographs are contained in a flyer distributed by the defendants to various business establishments in the Louisville metropolitan area, which will be described more fully herein, notwithstanding that said persons have not been convicted of the offense of shoplifting or any similar offense. These persons constitute a class so numerous as to make it impractical to bring them before this Court. There are common questions of law and of fact affecting the rights of said persons, and common relief is sought. The defendants have acted, and intend to continue to act, on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole. The plaintiff will fairly and adequately represent the interests of the class.

6. On or about December 5, 1972, the defendants jointly caused to be sent a flyer to numerous business establishments in the Louisville metropolitan area. A copy of said flyer is attached to this Complaint as Annex A. The stated purpose of the flyer was to enable business establishments to watch for the persons whose names and photographs were contained in the flyer, said persons being described as "subjects known to be active in the criminal field of shoplifting." The flyer stated that the persons whose names and photographs were contained therein "have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas." The business establishments to whom the flyer was sent were invited to obtain additional information from the

Planning and Research Unit of the Louisville Division of Police. The name and photograph of the plaintiff was contained on page 2 of said flyer under the heading of "active shoplifters."

7. The plaintiff is a law-abiding citizen who is employed as a photographer by the Louisville Courier-Journal and Times. On June 14, 1971, he was arrested in Louisville, Kentucky on a charge of shoplifting. Plaintiff was innocent as to said charge. The charge was filed away, and the plaintiff was never tried or convicted of such charge. A certified copy of the order filing the charge away is attached to this Complaint as Annex B. Thereafter, the charge was totally dismissed by the Court. A certified copy of the order dismissing the charge is attached to this Complaint as Annex C.

8. Following the circulation of the flyer described above by the defendants herein, the plaintiff was informed by his employer that his ability to perform as a photographer on said job was seriously impaired as a result of his name and photograph having been included in said flyer, and that his employer was considering the possibility of terminating his employment for that reason, and that he would be immediately discharged upon any subsequent arrest.

9. The actions of the defendants herein in publicly disseminating to various business establishments the name and photograph of the plaintiff and the other members of the class under the heading of "active shoplifters" are violative of rights guaranteed to the plaintiff and the class by the Constitution of the United States for the following reasons among others:

(1) They violate the right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to said Constitution, in that they constitute disclosure to large segments of the pub-

lic of the existence of an arrest which has not terminated in conviction, together with a declaration on the part of governmental officials that the persons arrested were in fact guilty of the offense and are likely to commit the same offense again;

(2) They impose an unconstitutional restrain on the liberty of persons designated as "active shoplifters" in that these persons will be inhibited from entering business establishments for lawful purposes because of the fear that they will be suspected of shoplifting and possibly apprehended, which is violative of the Fourteenth Amendment's guarantee of due process of law;

(3) They seriously impair the employment opportunities of persons designated as "active shoplifters," in that employers will be inhibited and deterred from employing such persons, since that designation carries the connotation that they are not trustworthy and are likely to commit criminal offenses, which is violative of the Fourteenth Amendment's guarantee of due process of law;

(4) They constitute summary punishment of persons who have not been convicted of any criminal offense, in that they brand such persons as criminals, which likewise is violative of the Fourteenth Amendment's guarantee of due process of law.

10. As a result of the illegal and unconstitutional actions described herein, the plaintiff and the class he represents have suffered grievous mental anguish, injury to his reputation, and permanent impairment of his earning capacity, for which compensation is sought.

WHEREFORE, plaintiff respectfully prays for the following relief:

1. That a declaratory judgment be issued to the effect that the actions of the defendants described herein are violative of rights guaranteed to the plaintiff and the class he represents by the Constitution of the United States.

2. That a permanent injunction issue against the defendants, their agents, employees and attorneys, and all other subject to their direction, restraining them from further circulation of the flyer described herein or of any other material listing the plaintiff and the class he represents as "active shoplifters" or in any other way publicly disseminating information concerning the previous arrest of the plaintiff for the offense of shoplifting.

3. That a permanent injunction issue against the defendants, their agents, employees and attorneys, and all others subject to their direction, requiring that they take the following actions forthwith:

(1) That they obtain the return of the flyers described herein from all business establishments and persons to whom said flyers were sent;

(2) That they instruct by an identical method, i.e. in writing and following the initial distributive pattern, said business establishments and persons that the plaintiff and the other members of the class are not "active shoplifters," but to the contrary have not been convicted of shoplifting or any similar offense;

(3) That they turn over all records in their possession relating to the plaintiff's arrest for the offense of shoplifting to this Court, so that said records may be destroyed by the United States Marshall in open Court.

4. That the plaintiff be awarded compensatory damages against each defendant in the amount of $50,000, and puni-

tive damages against each defendant in the amount of $100,000.

5. That pending the hearing and determination of plaintiff's prayer for permanent relief, a preliminary injunction be issued against the defendants, their agents, employees and attorneys and all others subject to their direction, requiring that they take the following actions forthwith:

(1) That they obtain the return of the flyers described herein from all business establishments and persons to whom said flyers were sent;

(2) That they instruct by an identical method, i.e. in writing and following the initial distributive pattern, said business establishments and persons that the plaintiff and the other members of the class are not "active shoplifters," but to the contrary have not been convicted of shoplifting or any similar offense.

6. That the plaintiff be awarded his costs herein, including reasonable attorneys fees.

7. That the plaintiff be awarded any and all relief to which he or the class he represents, may appear to be entitled.

(s) William H. Allison, Jr.
139 South Fourth Street
Louisville, Kentucky 40202

Robert Allen Sedler
B x 862
University Station
Lexington, Kentucky 40506

Attorneys for Plaintiff on behalf of the Kentucky Civil Liberties Union

ANNEX B

Case No. E66147 December 8, 1972

Commonwealth of Kentucky - - - Plaintiff

v.

Edw. Chas. Davis, III - - - - - Defendant
407 So. 39th

CERTIFIED COPY OF JUDGMENT

At a Court held on the 21 day of September, 1971, came the Defendant in person and by counsel _____ pursuant to a Warrant of arrest or pursuant of arrest or citation made 14 day of June, 1971, and having been arrainged upon the charge of KRS 433-234 entered a plea of NOT GUILTY thereto.

There appeared as witnesses for the Commonwealth:

Officer Richardson Consolidated Sales

There appeared as witnesses for the Defendant:

Final Disposition: 9/21/71 Filed Away With Leave No P.W.

This 8 day December, 1972.

(s) Neville M. Tucker, Judge

I, Margueritte Younger, Clerk of the City of Louisville Police Court do hereby certify that the foregoing is a true and correct copy of the Judgment rendered herein.

ANNEX C

Case No. E66147 December 12, 1972

Commonwealth of Kentucky - - - Plaintiff

v.

Edw. Chas Davis, 3rd - - - - - Defendant
407 So. 39th

CERTIFIED COPY OF JUDGMENT

At a Court held on the 11 day of December, 1972, came the Defendant in person and by counsel _____ pursuant to a Warrant of arrest or pursuant of arrest or citation made 14 day of June, 1972, and having been arraigned upon the charge of KRS 433-234 entered a plea of NOT GUILTY thereto.

There appeared as witnesses for the Commonwealth:

Officer Richardson

There appeared as witnesses for the Defendant:

Final Disposition: 12/11 Dismissed Per Judge Shobe

This 12 day December, 1972.

(s) Ben Shobe, Judge

I, Margueritte Younger, Clerk of the City of Louisville Police Court do hereby certify that the foregoing is a true and correct copy of the Judgment rendered herein.

(s) Margueritte Younger

ANNEX A

TO: BUSINESS MEN IN THE METROPOLITAN AREA

The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field.

This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.

Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing to:

PLANNING AND RESEARCH UNIT
LOUISVILLE DIVISION OF POLICE
633 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202

NOTE: ALL REQUESTS SUBJECT TO APPROVAL BY THE RESPECTIVE CHIEF OF POLICE.

This flyer's preparation is accredited to officers of the Second(2nd) Police District, Tactical Unit, and Detectives of the Criminal Intelligence Section, in cooperation with the Planning and Research-Development staffs of the Police Departments.

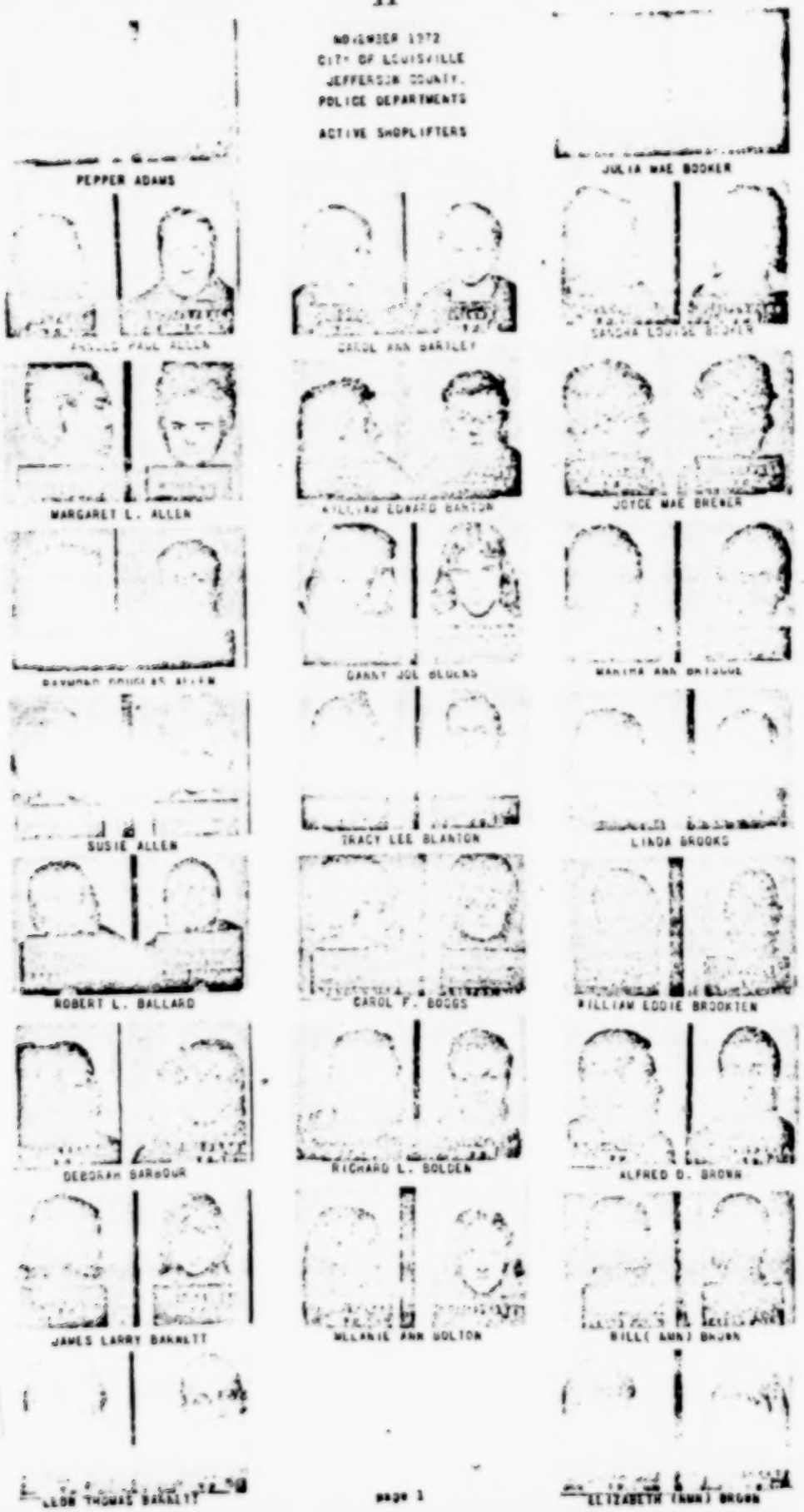
Sincerely,

(s) Col. Edgar Paul
Chief of Police
Louisville Division of Police
EP/hr

(s) Col. Russell McDaniel
Chief of Police
Jefferson County Police
RM/hr

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY,
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

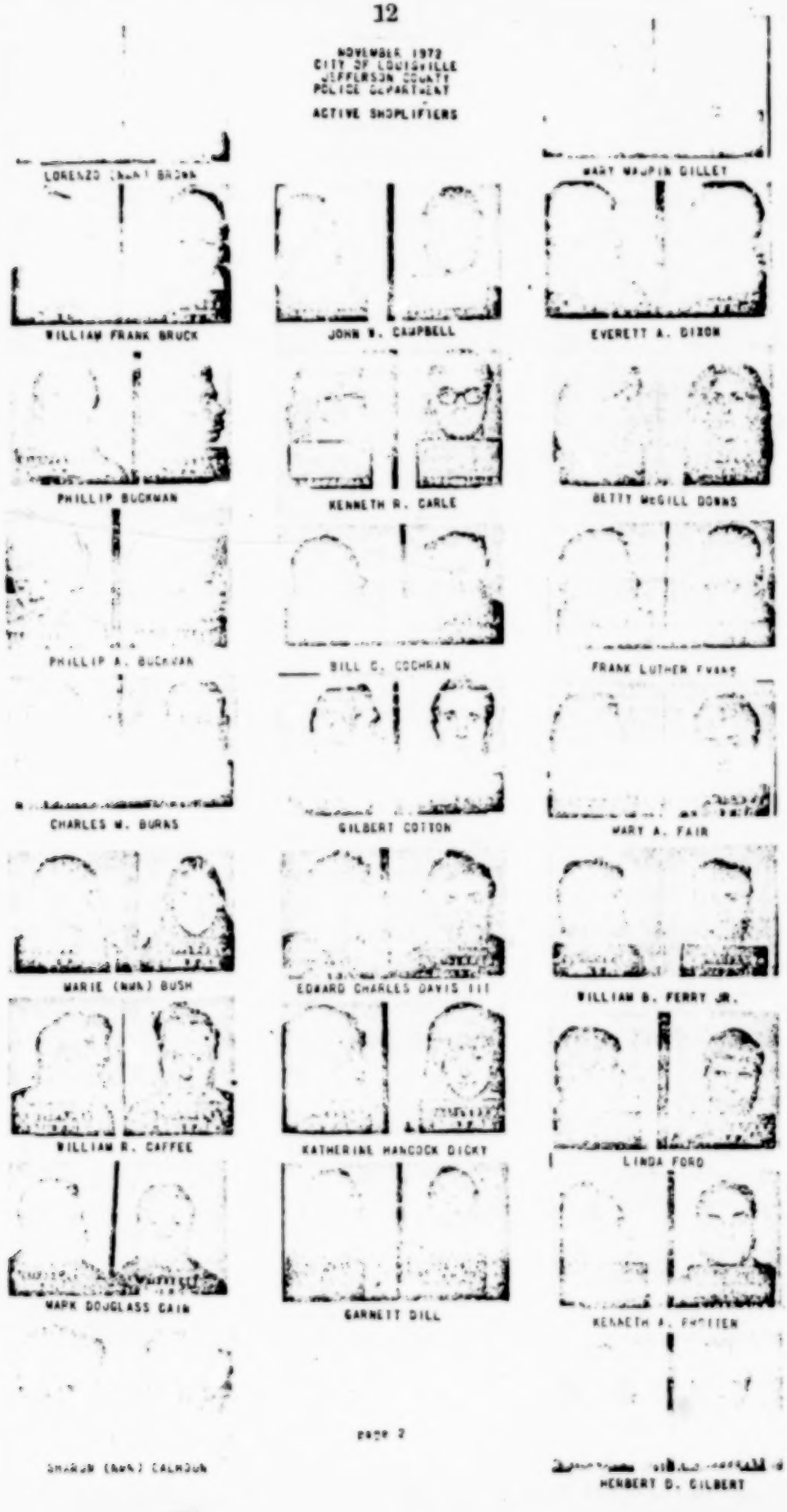


BEST COPY AVAILABLE

BEST COPY AVAILABLE

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENT

ACTIVE SHOPLIFTERS



NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENT

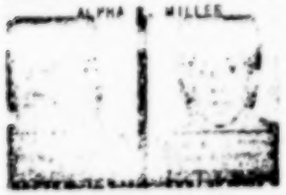
ACTIVE SHOPLIFTERS

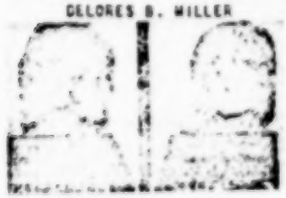
NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

SAMUEL McNEESE

ALPHA L. MILLER

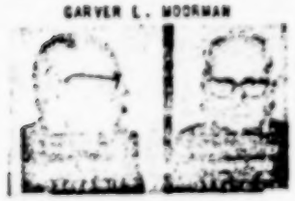

DELORES B. MILLER

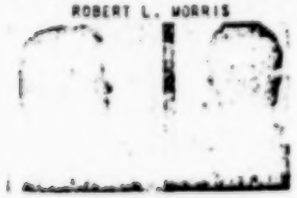

PAMELA LEE MILLER

ROBERTA MILLER

CAROL D. MIMMS

GARVER L. MOORMAN


ROBERT L. MORRIS


WARREN NASH

WALTER NELSON

MORRIS LELAND NEW

CLARENCE O'DELL

HARRY T. PHELPS

PATSY ANN PHELPS

CHERYL L. PITTS

GEORGE D. POINTS

WILLIAM HENRY POWELL

KIMBERLY RAMOS

MARCIA E. RHODES

LOLIDA RISINGER

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

EDWARD L. ROBINSON

MARY F. ROGERS

CHARLES D. ROSENBARGER

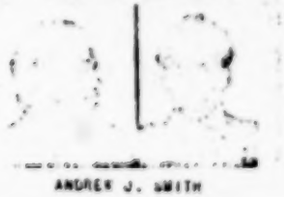
VITTORIO SAFFEI

NEYSA SCOTT

CLARENCE M. SEARS

ALTON D. SELF

THOMAS L. SINKHORN


ANDREW J. SMITH

DORIS SPENCER

KATHERINE SPENCER

IVORY STEVENSON

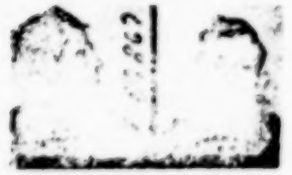
THOMAS C. TURNBILL

DAVID L. WADE

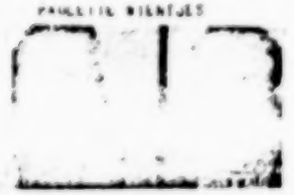
PATRICK WALSH

ARTHUR WELLS

WILLIAM WELLS


WILLIAM PAUL WIEGAND

PAULETTE WIENTJES


ARTHUR WILLIAMS

LUCILLE ANN WILLIAMS

TERRY WILSON

GEORGE WRIGHT JR.

GELENA ZACHERY

1

TRANSCRIPT OF THE PROCEEDINGS

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil No. 7503

EDWARD CHARLES DAVIS, III - - - - - *Plaintiff*

v.

EDGAR PAUL, Chief of Police, Louisville Division of Police and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Police - - - - - *Defendants*

Before Honorable Rhodes Bratcher, United States District Judge, Western District of Kentucky, at Louisville, Kentucky, on Monday, January 8, 1973, without a Jury.

Appearances:

For the Plaintiff
Robert A. Sedler, Esquire
William H. Allison, Esquire

For the Defendants
John R. Wilson, Esquire
Irvin Foley, Esquire
Frank A. Logan, Esquire

• • • • • • •

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Mr. Sedler: (Interrupting) We'd like to call as our first witness Colonel Edgar Paul.

By the Court: Come around.

EDGAR PAUL, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. Robert A. Sedler

Mr. Sedler: You are Colonel Edgar Paul and you are the Chief of Police of the Louisville Division of Police, is that correct?

Mr. Paul: Yes, sir.

Q. And how long have you been Chief?

A. About a year and a half.

Q. And how long have you been on the force?

A. Thirty-one years.

Q. I'd like to mark as Plaintiff's Exhibit No. 1—

By the Court: (Interrupting) Let it be filed.

(Whereupon, a memorandum issued on behalf of the Louisville Division of

Police and Jefferson County Police was received and marked by the Reporter as Plaintiff's Exhibit No. 1.)

Q. I'd like to show you this document, Colonel Paul, on which your signature appears and ask you if in fact that is your signature?

A. It is my signature.

Q. And this document was sent out by you and Chief McDaniel in your capacity as Chief of Police of the City of Louisville, is that correct?

A. It was.

Q. Approximately when was it sent out?

A. Sometime just before the Christmas holidays. The exact date, I'm not sure of.

Q. To whom was it sent?

A. It was sent to the merchants. As far as the City Police were concerned, the merchants in the downtown area of Louisville.

Q. How many merchants would this have been?

A. I have no idea, sir.

Q. Well, do you have a list of the merchants you sent it to?

A. I don't have the list. It's

distributed by our Planning and Research Division, and I believe that there was probably about a thousand copies of this particular document made, and I think we now have about two hundred in the Louisville Division.

Q. So that about eight hundred then would have been circulated?

A. That's what I believe, yes, sir.

Q. Now, did you keep a record of the places to which they were circulated?

A. I'm not sure that we have an accurate record. We do have a running record of the persons that have asked for them in the past and that we have distributed them to. Now, whether we have an accurate record of exactly everyone this time, I'm not sure of.

Q. Would you explain what you mean by the satement "Persons who have asked for them in the past"?

A. These particular flyers have been distributed by the Louisville Division of Police for about fifteen years, and we have quite a few of the merchants who have asked for them. If we don't get them out when they think they should be out, then we

get a phone request or a letter or an oral request to know if we're going to distribute them again this year. That's what I mean by the ones that asked for them.

Q. Then you have a list of merchants who normally get them?

A. Yes, sir; I'm sure we do.

Q. Now, could a merchant come into the police office and identify himself as a merchant, obtain a copy of this?

A. Yes, sir; he could.

Q. Would you have a record of that when a person did?

A. I'm not sure whether I would have a record of it or not. I would have to check with the people who did distribute it, which are my Planning and Research Unit. I'm not sure about that.

Q. Was this distributed in Southern Indiana?

A. No, sir.

Q. Did you exchange this list with any police department in Southern Indiana?

A. Not to my knowledge.

Q. Now, in the—in response to the subpoena duces tecum, you produced the arrest record of

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Edward Davis and you were also asked to produce all records in your file relating to him, and you produced a record for a speeding offense that happened in 1967, is that correct?

A. Yes, sir.

Q. And this is the sum total of your records in regard to Edward Charles Davis?

A. Sum total of our arrest records, yes, sir.

Q. When you arrest a person, do you fingerprint them?

A. Yes, sir.

Q. And you photograph them?

A. Yes, sir.

Q. What do you do with the fingerprints and photographs?

A. They remain in our Identification Lab.

Q. Are they available for inspection by any other—any person outside the Police Department?

A. They're available for inspection by the persons whose record it is or by his written request for them or other law enforcement agencies.

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Q. But they would have to go through you?

A. Yes, sir.

Q. How about a person's arrest record such as the document that you've produced, is that available for inspection by anyone other than members of the Louisville Police Department?

A. Yes, it's available to the press. They have this through our teletype system.

Q. At the time of the arrest?

A. Yes, sir.

Q. Now, subsequent to the arrest, is that available to the press?

A. On request and approval by my office.

Q. Is it available to any other person on request and approval?

A. Yes. It's available to other law enforcement agencies, the Government agencies.

Q. But it wouldn't be available to private employers, for example?

A. No, sir.

Q. Do you furnish the Federal Bureau of Investigation with data relating to your arrest of subjects?

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A. Certain arrests, yes, sir.

Q. For certain offenses or—

A. (Interrupting) Certain offenses.

Q. These would generally be the more serious offenses?

A. Yes, sir.

Q. Now, on the arrest record of the shoplifting charge, there is a disposition—on all arrest records there is a place for disposition, is that correct?

A. Yes, sir.

Q. And on the card of Edward Davis for the offense of shoplifting, that space is filled in "FAWL, 9-22-71". What does that mean?

A. Filed Away With Leave to Reinstate on that date.

Q. Now, how would the police have obtained this information that it was filed away without (sic) leave? Is this routinely recorded?

A. It's routinely recorded. We keep a pending file. The card is placed in a separate file while it's in the court, and when it's disposed of in any manner, the court should normally return the card with the notation as to the disposition of the case.

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Q. So that you are aware of the disposition of all arrests that are made by the Louisville Police Department?

A. No, sir; only the ones that the court returns the decision to us. It is not mandatory that they do so.

Q. Do they in practice generally do so?

A. Normally, we get them back, yes, sir.

Q. Then who had the responsibility for preparing the flyer that was introduced here as Plaintiff's Exhibit No. 1?

A. The responsibility was, as I said, in my Planning and Research Unit. They were assisted by branches of the Louisville Division of Police and the Jefferson County Police Department.

Q. Who was the individual that was in charge of it?

A. Henry Rausch; Officer Henry Rausch.

Q. What is his position and rank?

A. He is Director of our Planning and Research Unit.

Q. And he would have had access to the arrest records?

A. Yes, sir.

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Q. And those arrest records would have indicated whether or not the person had been convicted of the offense?

A. Not necessarily.

Q. Or, to put it another way, it would indicate—if it—if there was a disposition on it, it would have indicated whether the person had been convicted or whether or not a disposition had taken place?

A. Yes, sir.

Q. So that when the flyer was prepared that person would have known that Edward Davis had not been convicted of the offense of shoplifting, is that correct?

A. Not necessarily.

Q. Wouldn't it be—it was on that card, wasn't it?

A. I have no way of knowing when that was entered on the card.

Q. The date is 9-22-71.

A. I believe, sir, that's the date that the decision was rendered, not the date that it was put on our card.

Q. Are you suggesting that this would

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have been put on subsequent to December, 1972?

A. I'm suggesting that it could have been put on at any time after the decision of the court.

Q. But it would have been—it was likely to have been put on before that time?

A. I have no way of knowing that, sir.

Q. Well, what's the normal practice for entering—how soon do you get back the disposition from the Police Court, Louisville Police? What's the normal time?

A. It varies, due to the business of the court, the ability of the secretary and the clerk in the court to get the case back to us with the proper designation. It varies from three days to two months.

Q. All right. But it's never taken more than two months?

A. I don't think so. I couldn't say. Not to my knowledge, anyway.

Q. So that it is likely that this designation which occurred on 9-22-71, based on past practice and experience, would have been entered prior to December, 1972, fifteen months later?

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A. I couldn't answer that question.

Q. Is it likely?

A. I couldn't answer that. I don't know if it's likely or not. It would be my opinion. I don't know.

Q. All right. I'll have your opinion.

By the Court: Well,—

Mr. Logan: (Interrupting) If Your Honor please—

By the Court: (Continuing)—I think it's in a realm—he's just risking an answer about this to satisfy the attorney. Go ahead.

Mr. Sedler: Well, Your Honor, I mean, I—I—I think the point—

By the Court: (Interrupting) I mean, he's just guessing at it. I mean, that's all. The pressure of your questions has caused him to venture a guess merely to relieve himself of further questions.

Mr. Sedler: Well, he's established that the ordinary practice is to enter this within two months after the event. Now, I'm sure the Chief knows as well as I know that this would have been entered before December, 1972, and just doesn't want—

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By the Court: (Interrupting) Well, he hasn't stated that. I don't know whether he knows it as well as you do or not.

Mr. Sedler: Because this is the normal pattern.

Mr. Logan: Judge, I would like—

By the Court: (Interrupting) That's what you're saying, Mr. Sedler. You're not testifying. I'm not going to ask this man or make him venture a risky answer on a matter he obviously doesn't know about merely to satisfy the urgings of the attorneys here.

Mr. Sedler: Well,—

By the Court: (Interrupting) If he doesn't know about it, I don't want him to get out on a limb about it.

Mr. Sedler: Very well.

By the Court: What—excuse me just a minute. What did you have to say?

Mr. Logan: Well, I was going to object to the general realm of these questions because the Chief of Police isn't necessarily the ones that makes these records, if Your Honor please.

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By the Court: Well, I think everybody understands that.

Mr. Sedler: We know that.

Mr. Logan: Well, that's exactly the point. You've reached the point because you're asking him something that the clerks up there do and the—and Doctor Sedler knows as much about the Louisville Police Court as I do, just from observation, never having been there. Unless the Chief of Police knows a lot more about it than a lot of lawyers, he doesn't know when those things are entered.

By the Court: Well, I think he's made that clear. I want him to testify, and I'm sure he's attempting to honestly and fairly, about what he knows. But I'm not going to make him risk answers—

Q. (Interrupting) All right. Who is in charge of preparing the arrest reports?

A. Officer Henry Rausch.

Q. And his position then, so that we—

A. (Interrupting) He's Director of our Planning and Research Unit.

Q. Then he would know if this entry

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occurred after December, 1972?

A. I'm afraid you would have to ask him. I don't know whether he would know that or not.

Q. He'd have the responsibility for knowing that?

A. He is the man who prepares the flyer to be distributed by getting the information from, as I mentioned

to you, the other units of our Police Department and the Jefferson County Police Department.

Q. Now, who made the decision to prepare the flyer for this year?

A. I made the decision, checked it with Colonel McDaniel, and he agreed to do it jointly.

Q. On each of the pages you used the designation, "Active Shoplifter", is that correct?

A. (Examining document) That's right.

Q. And you didn't limit this to persons who had been convicted of the offense of shoplifting, is that correct?

A. That's correct.

Q. My question is why did you not limit it to persons who had been convicted of the offense of shoplifting?

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A. I'm not sure why we didn't limit it, but what we were going on was, as states on the face page of the flyer, the persons were—had either been arrested during '71 or '72 or had been active in the field. So, therefore, we didn't limit it to convictions.

Q. Now, my question is what is the basis for your conclusion that a person—a person who has been arrested for the offense of shoplifting is an active shoplifter?

A. The very fact that he's been arrested for the charge of shoplifting and evidence presented to that effect.

Q. In other words, you're saying from the fact of arrest you would conclude and advise that he is an active shoplifter?

A. The fact of the arrest and the details of the arrest as you have on the card for Mr. Davis.

Q. Of course, this is based on what is presented by your officers?

A. That's right; the evidence presented.

Q. And this is not based on any finding of the court?

A. No, sir.

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Q. And I take it—on the flyer there is the opportunity, is it not, for the persons who receives this to contact the Police Department for more information about such persons, is that correct?

A. Yes, sir.

Q. And have you had requests for more information about the persons who are—

A. (Interrupting) Not personally.

Q. To the best—to the best of your knowledge, have such requests been submitted to the department?

A. I don't know that.

Q. Is there any other offense for which you distribute such flyers to merchants?

Mr. Logan: Object.

By the Court: What was the question?

Q. Or other—is there any other offense for which you distribute such flyers to merchants or—I was going to say other persons in the community.

By the Court: Well, I don't see—what's the relevancy of that?

Mr. Sedler: Well,—

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By the Court: (Interrupting) We're talking about this case. Let's see if we can't confine it.

Mr. Sedler: Well, I'm just trying to find out if he only does it for shoplifters.

By the Court: Well, just ask him for that. Do you do it for others?

Q. Any other offenses?

A. We do it for others.

Q. Pardon me?

A. We do it for others.

Q. For what other offense?

Mr. Logan: I object, unless we're going to get into—this is confined—

By the Court: (Interrupting) Well, I'm—I'm going to sustain the objection. You do it in other cases, other types of offenses?

The Witness: Yes, sir.

Q. And for these offenses you also include persons who have been arrested but whose arrest did not terminate in conviction?

A. We would; yes, sir.

Q. Now, on the—well, it may be called the shoplifting flyer, would this include all

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persons who were arrested for the offense of shoplifting during the year in question?

A. Yes, sir.

Q. And there wouldn't have been some persons who had been arrested whose names would be omitted? You went across the board on that?

A. Not intentionally.

Q. So you do try—without regard to any of the other facts, it was—it was the fact of the arrest that caused you to include the person's name and photograph in it?

A. No, sir; that's not right. Any information for a person that is active in the field would have been included in this flyer. If there was a photo in existence in the Louisville Division of Police—

Q. (Interrupting) Then this would include some persons—let me see—it would include some persons who had not even been arrested for the offense?

A. No, sir. We would have necessarily had to have a photo.

Q. Now, my question—then this includes persons who were arrested in previous years,

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is what I'm getting at.

A. Yes, sir; it could have.

Q. All right. So that if my understanding is correct, this included all persons who were arrested in '71 and '72?

A. That's true.

Q. And selected persons from—who were arrested in previous years?

A. I'm not sure that there is some people here that was arrested in previous years, but I assume from the number of persons here that many of these have been arrested many years back down the line consecutively, so their pictures would be there and the picture may have been taken a couple of years ago. If it had the same resemblance, we wouldn't necessarily have to take a new picture in '72.

Q. So there's no distinction made between persons whose arrest terminated in convictions and persons whose arrest did not terminate in convictions?

A. No, sir.

Q. That will be all on direct examination, Your Honor.

By the Court: Proceed.

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Cross-examination by Mr. John R. Wilson

Mr. Wilson: Colonel, when a person, an individual, is arrested and slated by your Police Department, is that noted in the records of the Louisville Police Court, the fact that a person has been arrested? In other words, you can go to the Louisville Police Court and check through their records and you can find out who's been arrested by the Louisville Police Department, can't you?

Mr. Paul: Yes, sir. When a person is arrested, we make a copy of the arrest information and forward it to the court immediately. The person would then appear before the court at a later time.

Q. And that record is available to any person that would go in and request it, wouldn't it? I mean, this is on record with the Police Court?

A. I couldn't answer about the Police Court. I assume it would be.

Q. Now, photographs that are taken of people arrested for any crime, these are referred to commonly as mug shots, is that correct?

A. That's right.

Q. If an individual comes in and

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complains that they've been a victim of a crime, isn't it normal practice for them to view various mug shots within the Police Department?

A. Yes, it is.

Q. Now, this flyer that was sent out to merchants, it contained some six pages, I believe. This was all stapled together, is that correct?

A. Yes, sir.

Q. And it would be read together as one document?

A. Yes, sir.

Q. That's all.

By the Court: You may stand down. Thank you.

(Witness excused.)

Mr. Allison: Call Mr. Al Allen.

By the Court: Come around.

ALBERT C. ALLEN, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

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Direct Examination by Mr. William H. Allison

Mr. Allison: State your name, please, Mr. Allen?

Mr. Allen: My name is Albert C. Allen.

Q. And where do you work?

A. At the Louisville Courier-Journal and Times.

Q. And what is your position with the—

A. (Interrupting) I'm Executive Director of Photography for the two newspapers.

Q. And do you know Mr. Eddy Davis?

A. Yes, I do.

Q. And in what capacity do you know him, Mr. Allen?

A. He is a member of my department.

Q. I see. And in what—what kind of position does he have with your department?

A. He is a lab man and a trainee photographer.

Q. Is it fair to say that you're his boss?

A. Yes, it is.

Q. All right. Now, Mr. Allen, I'm

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handing you Defense (sic) Exhibit No. 1 and asking you if you have ever seen that flyer before?

A. Yes, I have.

Q. Do you remember when you saw it?

A. Approximately mid December of 1972.

Q. And—okay, sir. And as a result of seeing that flyer did you take any action or did you have any discussion with any of your employees?

A. The flyer was originally called to my attention by two of my employees. I obviously discussed it with them at that time.

Subsequently, I examined the flyer myself in the office of a Louisville merchant and later discussed the incident with Mr. Davis.

Q. And in your discussion with Mr. Davis as a result of seeing the flyer did—what was the basis of your discussion with Mr. Davis?

A. I wanted first to inform him of the flyer's existence which seemed only fair and to inform him that I knew of its existence and that the flyer's existence was a matter of discussion within the department.

I wanted also to hear his—his version of the events that caused—his inclusion in the flyer.

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Q. And as a result of your discussion with Mr. Davis did you as his boss take any action in regard to Mr. Davis?

A. I'm not quite sure what you mean by "action".

Q. What—what—what was the result of the discussion that you had with Mr. Davis in regard to the flyer?

A. None. I informed him, as I say, that we—we knew about it, that I had no intention of judging his guilt or innocence on the basis of—of such a flyer, but this was a matter between himself and the courts and that as far as that incident itself was concerned the matter was closed, however, that he had best not find himself in a similar situation.

Q. And—

By the Court: (Interrupting) What did—I don't—now, you—you warned him that—not to find himself in the future in a similar situation. Do you mean—I don't know exactly what you mean by that.

The Witness: Well, I—

By the Court: (Interrupting) Do you mean not to have his—his picture—

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The Witness: (Interrupting) No, no. I see. Not to be arrested for shoplifting in the future.

By the Court: Arrested?

The Witness: Yes, sir.

By the Court: I thought you just stated a minute ago that you had no intention at any time to prejudge his guilt or innocence but that—and the appearance merely of his picture would have no effect on you.

The Witness: I said that the—the appearance of his picture and the listing of this case had no effect immediately; that is, he was not going to be fired at this time.

By the Court: Yeah.

The Witness: But that I would view very seriously any further incidents of this nature.

By the Court: Proceed.

Q. Is it or not a fact, Mr. Allen, that the effect of the flyer might be a detriment to Mr. Davis' work in relationship to the Courier-Journal?

Mr. Logan: I object.

By the Court: Sustained. Don't answer that.

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Q. Mr. Allen, as a result of the flyer, to your knowledge of its circulation, did you as Mr. Davis' boss, head of the department, have a different attitude as to the possible work situations that you could put Mr. Davis in?

Mr. Logan: I'm going to object to that, if Your Honor please.

By the Court: Yeah. Let's—sustained. Let's be more definite. Did you have a different attitude? I don't know maybe he had a more favorable attitude. Just say that. Maybe he would answer yes.

Q. Did you feel that this would interfere with Mr. Davis' function as a photographer?

By the Court: Don't lead him; just ask him the question.

Mr. Logan: Objection as to how he would feel.

By the Court: Just ask him questions. You're telegraphing every answer to him in the question.

Mr. Allison: Yes, Your Honor.

By the Court: Just ask him questions. Don't say, "Do you feel," and then tell him

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how he felt.

Q. Did you believe on—that you would have to limit Mr. Davis' activities?

Mr. Wilson: Objection.

Mr. Logan: Objection.

By the Court: Sustained.

Q. Could the circulation of this flyer have an effect on

Mr. Davis' ability to work effectively as a photographer with your department?

Mr. Logan: I object to that.

By the Court: Could it?

Mr. Allison: Yes, Your Honor.

By the Court: Overruled. I mean; sustained.

Q. No further questions, Your Honor.

By the Court: Wait just a minute. Wait just a minute. I don't—is that all—there seems to be some doubt whether he was through or not.

Mr. Allison: If Your Honor please, I would at least like to make an offer of proof for the record as to what the witness would say if I was able to have him under cross.

By the Court: All right.

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Mr. Allison: He is under subpoena, Your Honor. So may I do that, Your Honor?

By the Court: Do you want to do it narratively?

Mr. Allison: Before the bench or it doesn't make any difference.

By the Court: You can just go ahead.

Mr. Allison: All right. In answer to my question what would your answer be to the questions that I attempted to ask.

By the Court: Well, I believe you better be more specific.

The Witness: You asked me several questions, sir.

By the Court: Yeah.

Q. Do you feel that as a result of the flyer that Mr. Davis' ability as a photographer with the department would be hindered in any way?

A. I felt there was a—a potential that it would be hindered.

Q. As a result of the flyer, did you feel that you might have to possibly limit the places that he would possibly in the future go in as a member

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of your department?

A. Very definitely, I would.

Q. And why did you feel that way?

A. Our photographers must be accepted as a reasonably honorable and truthful man wherever they go. I felt that in view of this flyer's circulation to merchants of the community I could not, for example, assign Mr. Davis to photographing anything in a merchantile establishment and so that should such an assignment come up I would have been forced to have someone else cover that assignment rather than Mr. Davis.

Q. That's all.

By the Court: Did you restrict him?

The Witness: No, I did not.

By the Court: You have not restricted him at all?

The witness: I have not restricted him, no, sir.

By the Court: Okay. Let's go. Proceed. Are you through now, gentlemen?

Mr. Allison: Yes, Your Honor.

By the Court: All right.

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Proceed.

Mr. Logan: We don't care to question him.

By the Court: All right. Stand down. Thank you.

(Witness excused.)

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Supreme Court, U. S.
FILED
FEB 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and RUSSELL MCDANIEL, Chief of Police, Jefferson County Division of Police,

Petitioners,

—v.—

EDWARD CHARLES DAVIS, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and

RUSSELL McDANIEL, Chief of Police, Jefferson County Division of Police,

Petitioners

-v.-

EDWARD CHARLES DAVIS, III,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether law enforcement officials may, consistent with the constitutional right of privacy, as guaranteed by the Fourteenth Amendment's due process clause, disseminate to large segments of the public, flyers

containing the names and photographs of persons who have been arrested for, but not convicted of, the offense of shoplifting, and describing these persons as "active shoplifters," together with persons who have been convicted of the offense?

2. Whether law enforcement officials may, consistent with the Fourteenth Amendment's guarantee of procedural due process, disseminate to large segments of the public, flyers containing the names and photographs of persons described by said law enforcement officials as "active shoplifters," without first affording such persons a hearing on the question of whether they are in fact "active shoplifters?"

STATEMENT OF THE CASE

The respondent essentially agrees with the Statement of the Case as set forth by the petitioners except insofar as the petitioners intimate that the flyer in question was not widely disseminated. The complaint alleged that the petitioners had caused the flyers to be sent "to numerous merchants and business establishments in the Louisville Metropolitan area," and at the hearing on the motion for a

preliminary injunction the petitioner Paul testified that about 800 of the flyers had been distributed. (App., p. 22). The petitioners also neglect to inform the Court that the practice of sending out the flyers had been discontinued beginning with the 1973 Christmas season, although at that time the respondent's complaint had been dismissed by the District Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

The Petitioners Have Advanced No "Special and Important Reasons" Justifying the Exercise of This Court's Discretionary Jurisdiction on Certiorari.

The sole reason for granting certiorari that the petitioners have advanced is that this Court should determine whether the Court of Appeals erred in reversing the judgment of the District Court. The petitioners seem to be totally unaware of the considerations governing review on certiorari that are set forth in Rule 19 and of this Court's long-standing remainder to disappointed litigants that, "The jurisdiction [on certiorari] was not conferred upon this

Court merely to give the defeated party in the Circuit Court of Appeals another hearing." Magnum Co. v. Coty, 262 U.S. 159, 163 (1923). They do not allege, let alone show, that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter, or that it is in conflict with applicable decisions of this Court, nor do they even suggest that the question of the power of police departments to brand persons who have not been convicted of any crime as "active shoplifters" is an important one, because many police departments engage in this practice. Indeed, the Louisville and Jefferson County police departments have themselves abandoned this practice, even after the District Court had upheld its constitutionality. Even if the Court of Appeals erred - which it clearly did not - it is not the function of this Court to review erroneous decisions of Courts of Appeals on certiorari, and the petitioners have advanced no plausible reasons why this Court should grant certiorari in the case at bar.

II.

The Court of Appeals Was Clearly Correct in Holding That the Complaint Alleged a Violation of Federal Constitutional Rights

The essential argument of the petitioners is that what they did was not violative of the constitutional right of privacy, because every tort committed by government officials does not constitute a violation of the constitutional right of privacy, a proposition that the respondent does not dispute. It is not contended, for example, as in Baker v. Howard, 419 F.2d 376 (9th Cir. 1969), relied on by the petitioners, that the furnishing of information by police officers indicating that a person has committed a crime is violative of constitutional rights. But it is a far different matter when police departments disseminate 800 flyers containing the names and "mug shots" of many persons, coupled with a declaration of active criminality and the classifications of these persons, who have not been convicted of any offense, together with convicted criminals. As the Court of Appeals found, the branding of a person as an "active shoplifter" by police authorities and the

dissemination of this branding to substantial segments of the community without any kind of hearing whatsoever, is unconstitutional under this Court's holding in Wisconsin v. Constantineau. 400 U.S. 433 (1971). Moreover, as a matter of substantive due process, in which the constitutional right of privacy is rooted, Roe v. Wade, 410 U.S. 113 (1973), the state may not infer active criminality from the mere fact of arrest. As the Court of Appeals concluded:

> "Few things are as fundamental to our legal system as the presumption of innocence until overcome by proof of guilt beyond a reasonable doubt at a fair trial. The dissemination of the flyer in the case at bar is in the face of the presumption of innocence, disregards the Due Process Clause and is based on evidence that is not probative of guilt.
>
> Condemning a man to a suspect class without a trial and on a wholly impermissible standard, as in the case at bar, offends the very essence of the Due Process Clause, i.e., protection of the individual against arbitrary action." (App., pp. 28-29).

Both in terms of procedural and substantive due process, the actions of the petitioners in the case at bar were patently unconstitutional.

Even if it were this Court's practice on certiorari to review the correctness of decisions of Courts of Appeal, the decision of the Court of Appeals in the case at bar was clearly correct.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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Supreme Court, U. S.
FILED
MAY 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL McDANIEL, Chief of Police, Jefferson County Division of Police - **Petitioners**

versus

EDWARD CHARLES DAVIS, III - - **Respondent**

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

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IN THE

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October Term, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Division of Police - *Petitioners*

v.

EDWARD CHARLES DAVIS, III - - *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Western District of Kentucky dismissing the Respondent's complaint is not reported, but is printed in Appendix A of Petition previously filed herein. The opinion of the Sixth Circuit Court of Appeals, which reversed the Order of the District Court, is reported at 505 F. 2d 1180 (6th Cir. 1974) and printed in Appendix B of the Petition previously filed herein.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on October 22, 1974 (Appendix B at page 21 of Petition for Writ of Certiorari previously filed herein). The Petition for a Writ of Certiorari was filed on January 20, 1975, and granted on April 14, 1975. The jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of

Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. Section 2201

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other relation of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. Section 2202

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

KRS 433.236

"433.236 Detention of person suspected of shoplifting.

(1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employe who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a per-

son, and that he can recover same by taking the person into custody, may, for the purpose of attempting to effect recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time.

(2) Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments."

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grant jury, except in cases arising in the land or naval forces, or in the militia, when in

actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV, Section 1

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

QUESTION PRESENTED

Did the Court of Appeals below err in reversing the judgment of the District Court below and in holding that the distribution by the Petitioners of a flyer for the use and protection of local merchants and business establishments entitled "Active Shoplifters" and containing the identity of the Respondent, whose shoplifting arrest and charge had been filed away, was of such grave magnitude as to constitute an invasion of the civil rights secured to the Respondent under the Constitution and to require the invocation of Federal jurisdiction in accordance with 42 U.S.C. Section 1983?

STATEMENT OF THE CASE

The Respondent, Edward Charles Davis III, filed suit on December 12, 1972, in the United States District Court for the Western District of Kentucky under 28 U.S.C. Sections 1343(3)(4), 2201, and 2202, and 42 U.S.C. Section 1983, alleging a deprivation of his civil rights in general and violation of his right of privacy specifically. The Respondent's suit was brought against the Petitioners, Edgar Paul, who was Chief of Police of the Louisville Division of Police at the time the Respondent's claim arose, and Russell McDaniel, who was the Chief of Police of the Jefferson County Police Department both at the time the Respondent's claim arose and presently.

The Respondent was arrested on June 14, 1971, by private security officers and charged with a violation of Kentucky Revised Statutes 433.234, Shoplifting. On September 21, 1971, the case against the Respondent was "filed away with leave". On December 11, 1972, nearly nineteen (19) months after the case was filed away, the Respondent's case in Police Court was dismissed.

On or about December 5, 1972, the Petitioners authorized the preparation and dissemination to certain local merchants and business establishments in Jefferson County, Kentucky, a flyer containing names and photographs of persons suspected of being active shoplifters in the area. The purpose of the flyer was not to inform the public at large, but rather to alert local

businessmen so that they in turn could alert their security personnel to watch for these subjects. The flyer further stated that the persons contained therein had been arrested during 1971 and 1972 and charged with the crime of shoplifting.

On December 12, 1972, the instant action was initiated in the United States District Court for the Western District of Kentucky as a class action, alleging as unconstitutional the distribution of the aforementioned flyers. Furthermore, the Respondent demanded compensatory and punitive damages against the Petitioners. The Respondent based his claim for damages upon the theory that the Petitioners had deprived him of his constitutional right to privacy. On January 8, 1973, the District Court held a hearing on the Respondent's motion for a preliminary injunction. The District Court thereafter denied the Respondent's motion. On November 16, 1973, the District Court entered its judgment dismissing the Respondent's suit. (See Appendix A at page 17 of the Petition for Writ of Certiorari previously filed herein.)

Subsequently, the Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On October 22, 1974, the Court of Appeals reversed the District Court's judgment and remanded the case for further proceedings. (See Appendix B at page 21 of the Petition for Writ of Certiorari previously filed herein.) In so doing, the Court of Appeals held that the Respondent's claim did, in fact, allege a violation of rights guaranteed by the Constitution.

On January 20, 1975, the Petitioners filed a Petition for Writ of Certiorari seeking review of the judgment rendered by the Sixth Circuit Court of Appeals. On April 14, 1975 this Honorable Court granted said Petition.

SUMMARY OF ARGUMENT

The Petitioners' actions in the case at bar did not violate any "rights, privileges or immunities secured by the Constitution and laws" of the United States to the Respondent.

The distribution of the flyer in question to local merchants and business establishments was not of such grave magnitude as to constitute an invasion of the Respondent's alleged constitutional right of privacy. This Court has recognized a fundamental right of privacy in only extremely narrow circumstances. The Petitioners contend that its scope should not be expanded to include the Respondent's claim.

Furthermore, the Petitioners' actions did not result in a denial of due process of law to the Respondent. The Petitioners contend that the claim advanced by the Respondent constitutes nothing more than a potential tort case for defamation of character or invasion of privacy for which the proper remedy is a civil suit in the state courts. Under these circumstances, the Petitioners respectfully submit that the Respondent is not entitled to a full due process hearing *before* something of a potentially defamatory nature is said or written about him.

Since the Respondent has failed to state a claim for relief which the Federal courts have jurisdiction to entertain, the Petitioners respectfully submit that the judgment of the Sixth Circuit below should be reversed and the Respondent's claim dismissed.

ARGUMENT

The distribution by the Petitioners solely to local merchants and business establishments for their own internal use and protection of a flyer entitled "Active Shoplifters" and containing the identity of the Respondent, whose shoplifting arrest and charge had been filed away, was not of such grave magnitude as to constitute an invasion of the civil rights secured to the Respondent under the Constitution and to require the invocation of Federal jurisdiction in accordance with 42 U.S.C. Section 1983.

The District Court below held that the actions taken by the Petitioners did not constitute an invasion of any constitutional rights, privileges or immunities secured to the Respondent. On appeal, the Circuit Court below reversed and remanded. The Petitioners respectfully disagree with the Sixth Circuit's opinion.

The Respondent bases his claim for relief in the federal courts upon 42 U.S.C. Section 1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Klu Klux Act of 1871 was the genesis of 42 U.S.C. Section 1983. It was originally intended to permit the institution of civil actions by aggrieved parties seeking redress of discriminatory acts undertaken against emancipated black citizens. In more than a century of active usage this statute has become the primary procedural weapon for persons seeking to wage warfare in the federal courts on ever-expanding legal frontiers. In so doing, the courts have permitted the utilization of the statute to be broadened far beyond its intended purpose. Nonetheless, it is well-established that in order to maintain an action under 42 U.S.C. Section 1983 one must establish two essential elements: (1) that the defendant acted under "color of law" *and* (2) that such actions deprived the plaintiff of some right, privilege, or immunity secured to him "by the Constitution and laws" of the United States. *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 150, 26 L. Ed. 2d 142, 150, 90 S. Ct. 1598 (1970); *Mimms* v. *Philadelphia Newspapers, Inc.,* 352 F. Supp. 862, at 865 (E.D. Pa. 1972).

In the instant case the Respondent contends that the Petitioners violated his right to privacy and/or his right to procedural due process of law by including the Respondent's name and photograph in a list circulated to local merchants and business establishments. It is undisputed that the Respondent was arrested and charged with the crime of shoplifting in June, 1971. In

September, 1971, the charges against the Respondent were "filed away with leave". Under Kentucky law, the disposition of "filing away" a criminal warrant is "not a final determination thereof but is an indefinite continuance of the case which may be reinstated on the docket upon reasonable notice at any time after such an order is entered." *VanArsdale* v. *Caswell,* Ky., 311 S. W. 2d 404 (1958). On December 5, 1972, the Petitioners circulated the aforementioned flyer to the local merchants. The cover letter accompanying the list stated *inter alia* that the persons named therein had been arrested during 1971 and 1972 for shoplifting (Single Appendix, page 9). In addition to the cover letter, the flyer consisted of five pages of photographs and names of 121 persons. At the top of each of the five pages, the words "Active Shoplifters" were printed (Single Appendix, pages 11-15).

It is undisputed that at the time the flyer in question was distributed the Respondent had been arrested for shoplifting in 1971 and his charge had been indefinitely continued by the "filing away". It was not until after the dissemination of the flyer that the Respondent was able to get the charges against him dismissed. The Respondent has brought the instant action under 42 U.S.C. Section 1983 in an effort to redress his complaint against the usage of the words "Active Shoplifters" at the top of the page wherein his name and photograph appeared in the list (Single Appendix, page 12).

For purposes of determining whether the Respondent has stated a claim for relief or whether the federal

courts have jurisdiction over his cause of action, we shall assume that the actions taken by the Petitioners were under "color of law". We shall focus our attentions upon the second essential element to be established in any effort to maintain an action under 42 U.S.C. Section 1983. In so doing, the central issue is whether the Petitioners' actions deprived the Respondent of any "rights, privileges or immunities" secured to him by the Constitution or laws of the United States. As such, the Respondent contends that the Petitioners' acts constituted a violation of the Respondent's right of privacy and/or right of procedural due process of law.

Let us first focus upon the Respondent's alleged right of privacy. It should be noted that nowhere in the United States Constitution is any mention made of a "right of privacy". In fact, this Court has stated that there is no "general constitutional right to privacy." *Katz* v. *United States,* 389 U. S. 347, 350, 19 L. Ed. 2d 576, 581, 88 S. Ct. 507 (1967). Furthermore, this Court went on to point out in the *Katz* case:

> ". . . the protection of a person's *general* right to privacy—his right to be left alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual State." 389 U. S. 347, 350, 19 L. Ed. 2d 576, 581, 88 S. Ct. 507 (1967).

It should be noted that "not every civil right is a right derived or secured by the Constitution or laws of the United States." 1 Barron and Holtzoff, Federal Practice and Procedure, Section 37. In fact, it has long been established that one's right of privacy sounds

in tort and gives rise to a common law cause of action in its own name. Warren and Brandeis, "Right to Privacy", 4 Harv. L. Rev. 193 (1890).

Notwithstanding these fundamental general principles, the Petitioners recognize that in certain circumstances the interest of a citizen in his personal privacy can be elevated to a constitutional right. For example, this Court recognized that the special nat re of the marital relationship was imbued with "a right of privacy older than the Bill of Rights". *Griswold* v. *Connecticut,* 381 U. S. 479, 486, 14 L. Ed. 2d 510, 516, 89 S. Ct. 1678 (1965). Furthermore, in reversing a state law prohibiting the use of contraceptives by married couples, this Court ruled that the rights secured by the First, Fourth, Fifth and Ninth Amendments have certain "penumbras" which create "zones of privacy".

The Petitioners would agree with the wisdom of the holding in *Griswold.* However, we cannot agree with the contention that the recognition of a carefully defined "zone of privacy" should be expanded to include the cause of action brought by the Respondent. Certainly, the *Griswold* decision cannot be relied upon in an effort to elevate a common law invasion of privacy into the deprivation of a constitutional right. That proposition was advanced and rejected in *Travers* v. *Paton,* 261 F. Supp. 110 (D. Conn. 1966). Therein, the plaintiff was a convict who contended that the defendants violated his constitutional right of privacy by televising his parole hearing without his prior knowledge or approval. In granting Summary Judgment to the de-

fendants, the court pointed out that the plaintiff had not established a claim for relief cognizable under 42 U.S.C. Section 1983. Instead, the plaintiff had merely presented a case of common law invasion of privacy. The court stated that the civil rights statute "encompasses a much narrower field", and excludes the type of action presented by the plaintiff. 261 F. Supp. 110, at 112. The court pointed out that the true objective of the civil rights statute is "to permit in federal courts only cases which have valid justification for being litigated in the federal system." 261 F. Supp. 110, at 112. In holding that the claims raised by the plaintiff were not of the nature designed to be litigated in the federal system, the court addressed itself to the right of privacy allegedly established in the *Griswold* decision:

> "It misses the heart and spirit of the *Griswold* case to casually infer an intent to adopt into the Constitution the entire body of the tort law right to privacy." 261 F. Supp. 110, at 113.

In the case at bar, the action of the Petitioners may have defamed the Respondent. Their actions may have invaded the Respondent's privacy. Since these are common law torts under the law of Kentucky, the proper forum for the Respondent's cause of action lies in the state courts of Kentucky.

It is well-settled that a defamation claim is not cognizable under 42 U.S.C. Section 1983. *Church* v. *Hamilton,* 444 F. 2d 105 (3rd Cir. 1971); *Peoples Cab Company* v. *Bloom,* 472 F. 2d 163 (3rd Cir. 1972); *Mimms* v. *Philadelphia Newspapers, Inc.,* 352 F. Supp. 862 (E.D. Pa. 1972); *Johnson* v. *Hackett,* 284 F. Supp. 933 (E.D. Pa. 1968); and *Brooks* v. *Dunn,* 376 F. Supp. 976 (W.D. Va. 1974).

The Petitioners have discovered only one case in which an invasion of privacy by police officers was held to give rise to a cause of action under 42 U.S.C. Section 1983. In *York* v. *Story,* 324 F. 2d 450 (9th Cir. 1963), the court held that where the defendants, while acting as city police officers, caused the plaintiff, who had come to the police station to complain of an assault, to be photographed nude in indecent poses, over her objections, and subsequently circulated the photographs among the police personnel, then the defendants were liable under the Civil Rights Act for invading the right of privacy of the plaintiff. The court was rightfully shocked by the unwarranted actions of the police officers in that case, and stated:

> "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity . . . Nor can we imagine a more arbitrary police intrusion upon the security of that privacy than for a male police officer to unnecessarily photograph the nude body of a female citizen who has made complaint of an assault upon her, over her protest . . . and to distribute those photographs to other personnel of the police department despite the fact that such distribution of the photographs could not have aided in apprehending the person who perpetrated the assault." 324 F. 2d 450, at 455.

In a case somewhat similar to the case at bar, the Ninth Circuit distinguished its earlier decision in *York* and held that the plaintiff failed to allege facts which, if proven, would establish that he had been deprived of any right secured by the Constitution. *Baker* v. *Howard,* 419 F. 2d 376 (9th Cir. 1969). In that case, the plaintiff alleged that after the police had investigated a "suspicious instant" involving him, which apparently did not result in any arrest, the police officers released statements to a local radio station indicating that the appellant therein had committed a crime. The radio station, also a party defendant, then broadcast the reports to the community at large. The combined police and radio station conduct directly resulted in the loss of the appellant's teaching position. In upholding the District Court's dismissal of the case due to a failure to state a claim for relief under 42 U.S.C. Section 1983, the Circuit Court ruled:

> "Under some circumstances, there can be such a gross abuse of privacy as to amount to an abridgement of fundamental constitutional guarantees . . . but the invasion of privacy here complained of is not, in our opinion, so flagrant that it calls for the invocation of the Constitution." 419 F. 2d 376, at 377.

It should be noted that the police actions alleged in *Baker* went much further than the actions undertaken by the Petitioners herein. There was no arrest or formal charge placed against the appellant in the *Baker* case. The defamatory statements were transmitted by the police to a public radio station and disseminated to

the entire community. Finally, the actions by the police officers and the radio station directly resulted in the termination of the appellant's employment.

As contrasted with the facts alleged in the *Baker* case, the Respondent herein was arrested and formally charged with the crime of shoplifting. His charges were filed away with leave to be reopened. The Petitioners circulated the flyer in question solely to local merchants and business establishments for the specific purpose of alerting said businessmen so that they in turn could alert their security personnel to watch for the subjects listed in the circular. The flyer was intended for the private use of local merchants in aiding them in their efforts to thwart shoplifting. It was not intended to be distributed to the public at large. Furthermore, the evidence introduced by the Respondent clearly demonstrates that his job was neither terminated nor placed in serious jeopardy (Single Appendix, pages 52-59). As such, the salient facts in the case at bar are less stringent than those in the *Baker* situation. Therefore, if no violation of a constitutionally protected right of privacy could be found in the *Baker* case, then it stands to reason that no violation of a similarly alleged right should be found in the instant case.

Two recent Circuit Court decisions have addressed the issue of police officers disseminating information to persons outside the police department, and held that such disseminations did not constitute violations of any rights secured by the Constitution. In *Rosenberg* v. *Martin,* 478 F. 2d 520 (2nd Cir. 1973), the Second Cir-

cuit reversed the District Court and held that a state prisoner's complaint which alleged that a police inspector had deliberately given various news media false information aimed at labeling the appellee as a "murderer" failed to state a cause of action under the Civil Rights Act for violation of the prisoner's constitutionally protected right of privacy. Herein, the Court distinguished the circumstances in *York, supra,* and adopted the holding in *Baker, supra.*

In *Tosh* v. *Buddies Supermarkets, Inc.,* 482 F. 2d 329 (5th Cir. 1973), the Fifth Circuit affirmed the District Court's judgment dismissing the plaintiff's complaint. In this case, a police detective, following an incident at a supermarket during a unionization campaign, complied with the request of the supermarket security chief for background information about the union organizers in order to enable the supermarket management to deal effectively with any similar future incidents. Subsequently, without the knowledge of the police officials, the supermarket management published the police rap sheets. The Circuit Court held that such action was not under color of state law. However, in its dictum, the Court went on to state:

> "The main argument which plaintiffs advance is that the dissemination of the arrest records to non-law enforcement persons or for non-law enforcement purposes violates their constitutional right to privacy. The right to privacy is not expressed in the Constitution . . . all we say here is that the Constitution does not bar a state agency from furnishing such information to those who present a legitimate need for and interest in the material." 482 F. 2d 329, at 332.

Certainly, it cannot be questioned that retail merchants have a legitimate interest in protecting their goods from theft. Under Kentucky law, merchants are directed to apprehend and detain any person suspected of shoplifting on their premises. K.R.S. 433.236. Thus, under the rationale in *Tosh* cited above, the Petitioners should not be prohibited from furnishing the information in question to local merchants.

Under the circumstances alleged in the instant case, the Petitioners respectfully submit that the Respondent has not stated a claim for relief on the grounds of a deprivation of his alleged constitutional right of privacy. Thus, we must focus our attention upon his claim that the actions taken by the Petitioners deprived him of procedural due process of law as guaranteed by the Constitution.

In reversing the District Court, the Sixth Circuit placed considerable emphasis upon the alleged denial of due process. The Circuit Court founded its decision upon this Court's ruling in *Wisconsin* v. *Constantineau,* 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971). In that case, a police chief, pursuant to the procedures set forth in a state statute, without granting any advance notice or opportunity to be heard, caused to be posted in all local retail liquor outlets a notice forbidding sales or gifts of liquor to the appellee for a period of one year. The appellee sued the police chief for damages and injunctive relief, challenging the constitutionality of the state statute. A three-judge court held the act unconstitutional on its face and issued an injunction.

This Court affirmed that judgment on a six-three decision.

The factual situations presented in the *Constantineau* case and the instant case are considerably different. The *Constantineau* case involved the unconstitutionality of a state statute which deprived a person of a due process hearing prior to the taking of official action in accordance with the procedures set forth in that statute. In the case at bar, no state statute is in question. Herein, the Petitioners were not directed by any statute, regulation, or ordinance to take any action whatsoever relative to the preparation and dissemination of the flyer. They did so independently of any directions or authority. In so doing, they acted alone.

In its decision in the *Constantineau* case, this Court talked in terms of the application of a "badge of infamy" to a citizen in addition to the deprivation of an obvious property right—the right to purchase alcoholic beverages. The application of that decision has caused some considerable confusion throughout the federal judiciary. Some decisions construe *Constantineau* most narrowly and have expressed the view that the Wisconsin statute struck down in that case failed under the Fourteenth Amendment because it did not provide for a hearing before prohibiting the sale of liquor to the appellee. (*Pugh* v. *Rainwater,* 332 F. Supp. 1107 (S.D. Fla. 1971) and *Greene* v. *The First National Exchange Bank of Virginia,* 348 F. Supp. 671 (W.D. Va. 1972).)

Generally, the *Constantineau* decision has been applied in conjunction with the subsequent ruling of this

Court in *Board of Regents* v. *Roth,* 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). In *Roth,* this Court found that a state university's failure to rehire an assistant professor without a hearing after the expiration of the single academic year for which he had been hired did *not* constitute a deprivation of liberty or property. In that case, no allegation damaging to the teacher's reputation had been made by school officials and loss of his job in and of itself did not amount to a deprivation of liberty or property. The teacher was at liberty to seek employment elsewhere. Therefore, his civil rights action failed. In so holding, this Court stated:

> "The requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some type of prior hearing is paramount. But the range of interest protected by procedural due process is not infinite." 408 U. S. 564, at 569, 33 L. Ed. 2d 548, at 556.

In underscoring the application of the *Constantineau* and *Roth* decisions to the case at bar, the Sixth Circuit relied upon testimony advanced by Mr. Albert Allen at the evidentiary hearing held before the District Court (Appendix B at pages 27 and 28 of the Petition previously filed herein.) The Petitioners respectfully submit that Mr. Allen's testimony presented by the Respondent went beyond the statements quoted in the Circuit Court's opinion. Mr. Allen also

stated that he had not reassigned the Respondent as a result of the circulation of the flyer. Furthermore, he testified that he had not restricted the Respondent's employment activities in any manner. Finally, he testified that he had not considered terminating the Respondent's employment as a result of the dissemination of the flyer in question (Single Appendix, pages 52-59). Contrary to the situations presented in *Constantineau* and *Roth,* the Respondent has failed to demonstrate any deprivation of liberty or property arising from the dissemination of this flyer. At the evidentiary hearing, the Respondent introduced no evidence indicating that he had been denied access to any stores or business establishments as was the case in *Constantineau.* The situation at bar is highly distinguishable from the primary cases relied upon by the Sixth Circuit in rendering its decision herein.

The Petitioners respectfully submit that the Respondent has alleged and demonstrated at best a cause of action for a tortious invasion of privacy and/or defamation of character. Furthermore, the Petitioners submit that a person is not entitled to a full due process hearing *before* something of a potentially damaging or defamatory nature is said or written about him. Under those circumstances, the Respondent's appropriate remedy is to bring an action in the state courts for injunctive relief and/or damages against the Petitioners for an alleged tortious invasion of privacy. The charges brought by the Respondent in the case at bar simply do not state a claim upon which relief can be granted under 42 U.S.C. Section 1983 and are not cognizable under the jurisdiction of the federal courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Circuit Court below should be reversed, and the Respondent's claim dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Bruce Miller, one of the attorneys for Russell McDaniel, Petitioner herein, acting on behalf of all counsel for both Edgar Paul and Russell McDaniel, and being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 29th day of May, 1975, I served copies of the foregoing Brief for Petitioners along with the Single Appendix on Edward Charles Davis, III, Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid, to his respective attorneys of record, as follows:

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Supreme Court, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and RUSSELL MCDANIEL, Chief of Police, Jefferson County Division of Police,

Petitioners,

—v.—

EDWARD CHARLES DAVIS, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-891

EDGAR PAUL, Chief of Police,
Louisville Division of Police, and
RUSSELL McDANIEL, Chief of Police,
Jefferson County Division of Police,

Petitioners,

-v-

EDWARD CHARLES DAVIS, III,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Did petitioners' dissemination of a flyer to approximately 800 private merchants and business establishments, characterizing respondent as an "Active Shoplifter," based solely on his arrest for shoplifting followed by the dismissal of all charges

against him, constitute a denial of respondent's presumption of innocence, his right to due process of law and invasion of his right to privacy, cognizable under 42 U.S.C. Section 1983?

STATEMENT OF THE CASE

On or about December 5, 1972, the petitioners, Chiefs of Police in the City of Louisville and Jefferson County, Kentucky, authorized the preparation and dissemination to the Louisville merchant community of a flyer containing names and photographs of persons described as "subjects known to be active in the criminal field of shoplifting" [App. 8].[1] According to Chief Paul, one thousand copies of the flyer were prepared, and approximately eight hundred were distributed to merchants and businessmen in downtown Louisville [App. 19]. The flyer stated that the persons whose names and photographs were contained therein "have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas" [App. 8]. The name and photograph of Edward Charles Davis III,

1/ "App." refers to the separate Appendix filed in this case.

the respondent, was contained on page 2 of the flyer under the heading, "Active Shoplifter" [App. 12].

Davis, a photographer employed by the Louisville Courier-Journal and Times, had been arrested in Louisville on June 14, 1971 for shoplifting. The charges against him were never prosecuted and were dismissed following his arrest. Davis has never been tried for nor convicted of the crime of shoplifting. On September 21, 1971, his case was "filed away with leave," and was dismissed on December 11, 1972 [App. 8].

Shortly after the flyer was released, two of Davis' fellow employees became aware of its existence and brought it to the attention of Albert C. Allen, Davis' supervisor at the Louisville Courier-Journal and Times. Mr. Allen immediately informed Davis that "he had best not find himself in a similar situation" in the future and that he "would view very seriously any further incidents of this nature" [App. 32]. Allen also testified that the circulation of the flyer "hindered" Davis' employment because, "in view of this flyer's circulation to merchants of the community, I could not, for example, assign Mr. Davis to photographing anything in a merchantile (sic) establishment and so that, should such an assignment come up, I would have been forced to have someone else cover that

assignment rather than Mr. Davis" [App. 35].[2]

Alleging that he and other persons similarly situated have suffered mental anguish, injury to reputation and impairment of earning capacity as a result of the wide and reckless distribution of the flyers by the petitioner police chiefs, Davis initiated this suit as a class action[3] under 42 U.S.C. Section 1983 and 28 U.S.C. Sections 1343(3) and (4), on December 12, 1972, seeking compensatory and punitive damages against petitioners, based on their deprivation of his right to due process of law guaranteed by the Fourteenth Amendment, and their invasion of his right to privacy, provided by the First, Fourth, Fifth, Ninth and Four-

---

2/ It is significant that petitioners claim, despite the effect of their flyer, that they do not make arrest records "available to private employers" [App. 21]. Indeed, since they exchange arrest records with the Federal Bureau of Investigation [Id.], they are expressly prohibited from doing so. See Menard v. Mitchell, 328 F.Supp. 718, 727 (D.D.C. 1971).

3/ A class determination has not yet been made by the District Court.

teenth Amendments. On January 8, 1973, the District Court conducted a hearing on Davis' motion for a preliminary injunction, and thereafter denied the motion. On November 16, 1973 the District Court held that petitioners had not violated Davis' constitutional rights and dismissed his suit. On October 22, 1974, the United States Court of Appeals for the Sixth Circuit reversed the District Court's decision and remanded the case for further proceedings. The Court of Appeals, relying principally on the decision of this Court in Wisconsin v. Constantineau, 400 U.S. 433 (1971), held that Davis' claim that petitioners' action had deprived him of the right of due process guaranteed by the Fourteenth Amendment stated a cause of action.

SUMMARY OF ARGUMENT

Petitioners, by widely circulating over eight hundred copies of a leaflet branding respondent an "active shoplifter," although he had never been convicted of any crime and all charges pending against him were dropped shortly thereafter, violated his "rights, privileges or immunities secured by the Constitution" of the United States, thus permitting respondent to invoke Federal jurisdiction in accordance with 42 U.S.C. 1983.

1. Punishment without guilt, and punishment on the basis of status rather

than conduct, have both been recognized by this Court as fundamental violations of the right of due process of law guaranteed by the Fourteenth Amendment. By publicly labelling respondent a criminal, solely on the basis of his status as an arrestee, and without meeting their burden of proving him guilty beyond a reasonable doubt, petitioners ignored the constitutionally-mandated presumption of innocence and denied respondent due process of law.

2. Where the state attaches a badge of infamy to a citizen, procedural due process requires notice and an opportunity to be heard before the damage to reputation is permitted. Petitioners' publication and widespread dissemination of the flyer stigmatizing respondent as an "active shoplifter" curtailed his usefulness to his employer, jeopardized his job and damaged his good name. As the Court of Appeals recognized in holding that respondent's claim does allege a violation of constitutionally-protected rights, petitioners' failure to provide Davis with notice and an opportunity for a hearing denied him the procedural due process required by the Fourteenth Amendment.

3. This Court has construed the constitutional right of privacy to protect personal liberty from infringement by state action in a wide variety of circumstances. Respondent's arrest record is of doubtful relevance in determining his honesty or morality, but the damaging effect

of its wide dissemination on his employment, reputation, and psychological well-being constitutes a grave invasion of his right of privacy and cannot be justified by any compelling state interest.

ARGUMENT

I

PETITIONERS HAVE PUNISHED DAVIS FOR HIS STATUS AS AN ARRESTEE AND HAVE THEREBY VIOLATED HIS PRESUMPTION OF INNOCENCE AND HIS RIGHT TO DUE PROCESS OF LAW.

By publicly and intentionally circulating over eight hundred copies of a flyer branding Davis an "Active Shoplifter," the petitioners have effectively punished him for the offense of shoplifting, although he has never been convicted of that crime and all charges against him were dismissed less than a week after the flyer was issued. That respondent has in fact been punished is demonstrated by the testimony of his employment supervisor that his usefulness as a newspaper photographer has been curtailed and any future "incidents" will result in his dismissal [App. 32].

When state officials punish an innocent citizen, their action "violates the most rudimentary concept of due process of law." Giaccio v. Pennsylvania 383 U.S. 399, 405 (1966) (Stewart, J. concurring).

At the time the flyer was released, the only evidence of any wrongdoing on Davis' part was the bare fact of his arrest. But an arrest "proves nothing so far as the actual conduct of the person arrested is concerned." Menard v. Mitchell, 328 F.Supp. 718, 724 (D.D.C. 1971), rev'd in part, aff'd in part, 498 F.2d 1017 (D.C. Cir. 1974). This Court has repeatedly affirmed the basic principle that under our system of criminal justice only a conviction carries legal significance as to a person's involvement in culpable behavior. "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct." Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957). When, as in the case at bar, the arrested person is released without trial, "whatever probative force the arrest might have had is formally dissipated." 353 U.S. at 241.

Since an arrest alone can provide no basis for the conclusion that the arrested person has engaged in criminal conduct, the sole rationale is his status as an arrestee. But "the due process clause of the Fourteenth Amendment prohibits as cruel and unusual the punishment of status." Wheeler v. Goodman, 306 F. Supp. 58, 62 (W.D. N.C. 1969). Accordingly, this Court has voided statutes which impose punishment because of a disease, such as narcotics addiction. Robinson v. California, 370 U.S. 660 (1962); for

the same reason, "a citizen cannot be punished merely for being a 'suspicious person'," Ricks v. District of Columbia, 414 F.2d 1097, 1110 (D.C. Cir. 1968); nor can a person be punished because of his indigent economic status. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Florida, 405 U.S. 172 (1972). Here, there has been no determination -- indeed, there is no evidence -- that respondent's status resulted from any misconduct on his part. Thus, his status as an arrestee is a constitutionally impermissible basis for punishment.

The principle that an arrest without a trial or conviction provides no basis for the inference of guilt or the imposition of punishment is grounded in "the presumption of innocence that surrounds the defendant in a criminal prosecution." United States v. Fleischman, 339 U.S. 349 (1950). Although the presumption of innocence is not explicitly mentioned in the Constitution, this Court has indicated many times that it is assumed to be constitutionally required under the due process clauses of the Fifth and Fourteenth Amendments. See, e.g., Schware v. Board of Bar Examiners, supra; United States v. Fleischman, supra; In Re Winship 397 U.S. 358 (1970). Indeed, in Winship the Court extended the constitutional basis of the presumption of innocence to hold that the proof of guilt beyond a reasonable doubt is also constitutionally mandated. Thus, "[A] society that values the good name and freedom of every individual should not condemn

a man for commission of a crime when there is a reasonable doubt about his guilt". 397 U.S. at 364.

Here, where respondent has never been tried for the crime for which his good name has been injured and all charges against him have been dropped, there is far more than reasonable doubt about his guilt. Although our criminal justice system endows police officers with broad discretion in making arrests, it relies on the other ingredients of the system -- the preliminary hearing, the right to counsel, the presumption of innocence, and the state's burden of proving guilt beyond a reasonable doubt -- to weed out errors and to prevent the punishment of innocent persons. "It is also important to our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty." In re Winship, 397 U.S. at 358. By proclaiming to the Louisville community that Davis is an active criminal, petitioners violated the presumption of innocence, failed to meet their burden of proving guilt beyond a reasonable doubt, and thus denied him due process of law.

II

BY BRANDING RESPONDENT WITH A BADGE OF INFAMY, WITHOUT GIVING HIM NOTICE AND AN OPPORTUNITY FOR A HEARING, PETITIONERS DE-

PRIVED HIM OF HIS RIGHT TO PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

When the police publicly and officially characterized Davis as an "active shoplifter" -- without giving him notice or an opportunity for a hearing to challenge their action -- they denied him his right to procedural due process under the Fourteenth Amendment. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction is a principle basic to our society." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951)(Frankfurter, J., concurring).

In correctly applying this principle to Davis' case, the Court of Appeals relied primarily on the decision of this Court in Wisconsin v. Constantineau, 400 U.S. 433 (1971). There, a statute permitting police officials to post in all local retail liquor stores a notice forbidding sales or gifts of liquor to persons who drink excessively was struck down for failing to provide the persons whose names were posted with advance notice and an opportunity to be heard. The Court's conclusion that "where the State attaches a 'badge of infamy' to the citizen, due process comes into play" (400 U.S. at 437) is directly on point here. In fact, the case at bar presents a stronger claim based on the denial of procedural due process

protections than did Constantineau.

The public and official characterization of Davis as an "active shoplifter" is unquestionably a "badge of infamy". While it is possible that Constantineau's posting as an excessive drinker might have been interpreted by the community as no more than a mark of illness or infirmity, no such mitigating interpretation is possible here. Being labelled a criminal is a flat proclamation of dishonesty, untrustworthiness, dangerousness to society, and immorality. Davis' good name and integrity were soiled by the police flyer without his having any opportunity to challenge petitioners' action. This is contrary to the clear requirement of Constantineau. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. at 437.

Petitioners' have attempted to distinguish Constantineau on the ground that the police chief in that case was acting pursuant to a statute, while the police here assertedly acted "independently of any directions or authority" [Pet. Br. at 20]. It is difficult, however, to fathom the significance of this distinction. Petitioners acknowledge that their actions were taken "under color of law" (Id. at 12), and this Court has expressly held, of course, that the absence of a statute is no bar to a suit against state officials under Section

1983. Adickes v. S.H. Kress, 398 U.S. 144 (1970).

Nor is the holding of this Court in Board of Regents v. Roth, 408 U.S. 564 (1972), that procedural due process is required only where liberty or property interests are present, any impediment to respondent's claim. The record reflects that petitioners' action in publishing the flyer directly implicated Davis' liberty interest within the meaning of Roth. Although Roth rejected the procedural due process claim of a non-tenured state university assistant professor that he was entitled to a hearing before his contract could be cancelled, the Roth Court, relying on Constantineau, stated that procedural due process would have been required had Roth been charged with "dishonesty or immorality" (408 U.S. at 573), as Davis has in this case. In Sims v. Fox, 505 F.2d 857, 863 (5th Cir. 1974) (en banc), the Fifth Circuit recently analyzed Roth in terms directly relevant to Davis' claim:

> "Roth teaches that the government's attack on one's reputation may infringe constitutionally protected liberty in two respects: (1) governmental degradation of one's standing in his community may be a denial of 'liberty'; (2) governmental communication of derogatory information to employers may be an

attack on 'liberty.'"[4]

Thus, even if petitioners were correct that the dissemination of the flyer did not directly injure respondent's employment,[5] the very "degradation of one's standing in his community" that results from being branded a shoplifter implicates the liberty interest identified in Roth and mandates the full protection afforded by constitutional procedural due process. Constantineau, Roth, and the line of cases interpreting Roth thus demonstrate that by failing to provide respondent with notice and an opportunity for a hearing before publicly labelling him a criminal, petitioners denied him the due process required by the Fourteenth Amendment.

4/ See also, Kaprelian v. Texas Women's University, 509 F.2d 133 (5th Cir. 1975); Ortwein v. Mackey, 511 F.2d 696, 698 (5th Cir. 1975)("infringement of one's liberty interest can be found . . . where the governmental agency has made . . . the allegedly stigmatizing charge public in any official or intentional manner.")

5/ Petitioners' contention that respondent was not injured, however, flies in the face of the record, which reveals that Davis' employment supervisor concluded that the circulation of the flyer had "hindered" Davis' usefulness [App. 34], since "[o]ur photographers must be accepted as reasonably honorable and trustful men wherever they go" [App. 35]. Accordingly, Davis can no longer be sent on a reporting assignment in any "merchantile establishment" [Id.].

III

PETITIONERS' WIDE DISTRIBUTION OF THE RECORD OF RESPONDENT'S ARREST NOT RESULTING IN CONVICTION, FALSELY CHARACTERIZED HIM AS A CRIMINAL, THEREBY INVADING HIS RIGHT TO PRIVACY

Although the privacy issues arising out of the use and abuse of arrest records are relatively recent developments in the law, federal and state courts throughout the country have increasingly held that the wide dissemination -- and sometimes even the retention -- of records of arrest not followed by conviction constitutes an invasion of the constitutional and common law right to privacy. See, e.g., Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974), Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970), on remand, 328 F. Supp. 718 (D.D.C. 1971), aff'd in part, rev'd in part sub nom. Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969); Kowall v. United States, 53 F.R.D. 211 (WD Mich. 1971); Wheeler v. Goodman, 306 F. Supp. 968 (WD NC 1969), United States v. Kalish, 271 F. Supp. 768 (D. PR 1967), Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971), Davidson v. Dill, 503 P.2d 157 (Colo. 1972).[6]

6/ The leading federal case on this issue

In barring dissemination and some-

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6 / continued

is Menard v. Saxbe, supra. Menard had been picked up on "suspicion" of burglary; although charges were never brought against him, his arrest record and fingerprints were forwarded to the FBI. In Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970), the Court of Appeals reversed the District Court's grant of summary judgment and held that Menard's suit to expunge his record from the FBI files on grounds of invasion of privacy stated a claim for which relief could be granted. "It is clear that the government may not, wittingly or unwittingly, engage in wanton defamation of individuals and groups" [430 F.2d at 492]. On remand, the District Court held that the dissemination of arrest records of unconvicted persons "clearly invades individual privacy by revealing episodes in a person's life of doubtful and certainly not determined import" [328 F. Supp. 718, 725 (D.D.C. 1971).] On a second appeal, the Court of Appeals affirmed the judgment barring dissemination of Menard's arrest record, and remanded the case to the District Court with instructions to order expungement of the record from the FBI's criminal files [498 F.2d 1017 (D.C. Cir. 1974)]. Although this Court has not made a definitive statement on the problem of privacy and the police records of un-

times ordering the expungement of the arrest records of persons not convicted of a crime, courts have taken judicial notice of the personal injury and economic hardship resulting from the public circulation of arrest records. As the Court of Appeals observed in Menard v. Mitchell, 430 F.2d at 490, for example, "opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved." It has also been judicially noticed that a person with an arrest record is more likely to be subject to police scrutiny -- the first to be questioned and the last to be eliminated as a suspect in an investigation. See, e.g., United States v. MacKay, 43 U.S.L.W. 233 (Feb. 11, 1975). Similarly, if a person is subsequently arrested, his prior arrest record may arise

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6 / continued

convicted persons, Mr. Justice Rehnquist has expressed the view that "as a matter of policy or philosophy this controversy seems properly resolved in Menard's favor." Rehnquist, "Is An Expanded Right of Privacy Consistent With Fair and Effective Law Enforcement?" Nelson Timothy Stephens Lectures, University of Kansas Law School, 1974, p. 12.

to haunt him in presentence reports or in seeking bail pending trial. United States v. Cifarelli, 401 F.2d 512 (2d Cir. 1968) In sum, "the seriousness of the arrest record problem, although perhaps questionable in the past, is now too well documented to be doubted." Davidson v. Dill, 503 P.2d 157, 159-60 (1972).

The wide dissemination of arrest records is a denial of both the common law and constitutionally protected right to privacy and has a restrictive effect on the exercise of other fundamental constitutional rights. As the District Court pointed out in Menard, "systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work, and to move about in the land" (328 F. Supp. at 726). Here, respondent's employer has concluded that his ability to work has in fact been inhibited and he can no longer be used on certain assignments because of the publication of the police flyer. Indeed, Davis' employer has warned him that any future "incidents" resulting in the publication of a similar flyer will result in his dismissal. Accordingly, he will necessarily be influenced to steer wide of any conduct which might cost him his job, including legitimate and constitutionally protected conduct. Such overbroad penalization of innocent conduct is inherent in the circulation of the arrest

records of unconvicted persons, as the Court of Appeals pointed out in Tarlton v. Saxbe, 507 F.2d at 1124:

> "Government collection and dissemination of inaccurate criminal information without reasonable precautions to insure accuracy could induce a levelling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment."

This restriction on respondent's right to work and the negative effect on his free exercixe of protected activities thus compounds the petitioners' assault on Davis' reputation. As one court has stated in an analogous circumstance, the dissemination of arrest records "constitutes an unwarranted attack upon [a person's] character and reputation, and violates his right of privacy; it violates his dignity as a human being." United States v. Kalish, 271 F. Supp. 968 (D. P.R. 1967). See also Eddy v. Moore, supra. The seriousness of the assault on privacy is exacerbated where as here respondent has never been convicted of any crime. As this Court indicated almost ninety years ago, "the essence of the offence . . . is the invasion of his indefensible right of personal security,

personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense." Boyd v. United States, 116 U.S. 616, 630 (1886) (emphasis supplied).

Petitioners even concede that their action may have invaded Davis' right of privacy, but assert that he has an exclusive civil remedy in the courts of Kentucky [Pet. Br. at 14]. But it is immaterial, insofar as the right to pursue remedies under the Civil Rights Act is concerned, that state remedies may also be available when constitutionally protected rights are infringed. This Court has repeatedly emphasized that "[i]t is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961). See also McNeese v. Board of Education, 373 U.S. 668 (1963), York v. Story, 324 F.2d 450 (9th Cir. 1963).

Although petitioners acknowledge that in certain circumstances the interest of a citizen in his personal privacy is protected by the Constitution, they urge the Court to restrict the holding of Griswold v. Connecticut, 381 U.S. 479 (1965), to a single "carefully defined 'zone of privacy'" [Pet. Br. at 13]. 7/ Given the necessary variety

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7/ It is significant that petitioners do

of facets of a right designed to protect a person's interests in reputation, mental well-being, and personal dignity -- which the right of privacy represents -- such an interpretation flies in the face of Griswold. Indeed, this Court has consistently construed the right of privacy broadly, including within its zone large areas of private behavior not subject to restrictive state action, absent a clear demonstration of compelling state interest. Here, petitioners have not offered the slightest evidence that their actions in circulating the flyer were governed by any state interest, compelling or otherwise.

The diversity of the interests protected and government actions proscribed by the right of privacy is as great as the number of constitutional provisions cited as the basis for the right. 8/ The

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7/ continued

not define this single "zone". Indeed, they recognize that in Griswold "this Court ruled that the rights secured by the First, Fourth, Fifth and Ninth Amendments have certain 'penumbras' which create 'zones of privacy'" [Pet. Br. at 13].

8/ In varying contexts and to varying degrees, the Court or individual Justices have based their recognition of the right

Constitutional protection of privacy has been found to include "the right to satisfy [one's] intellectual and emotional needs in the privacy of his own home," Stanley v. Georgia, 394 U.S. 557, 565 (1969); the right "to assume that the words [one] utters into the mouthpiece [of a telephone] will not be broadcast to the world," Katz v. United States, 389 U.S. 347, 352 (1967), and the right of parents to direct the upbringing and education of children under their control, Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). These unrelated activities are connected by the fact that their infringement inhibits the personal liberty which is the essence of the right of privacy. In

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8/ continued

of privacy on the First Amendment, Stanley v. Georgia, 394 U.S. 557 (1969); NAACP v. Alabama, 357 U.S. 449 (1958); the Fourth Amendment, Boyd v. United States, 116 U.S. 616 (1886); Katz v. United States, 389 U.S. 397 (1967); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting); the Ninth Amendment, Griswold v. Connecticut at 486 (Goldberg, J., concurring); the "penumbras" of the Bill of Rights, Griswold v. Connecticut, supra (plurality opinion); and in the concept of ordered liberty guaranteed by the Fifth and Fourteenth Amendments, Roe v. Wade, 410 U.S. 113 (1973).

protecting privacy, "time and again, this Court . . . has refused to place an unduly literal construction upon it." Olmstead v. United States, 277 U.S. 438, 476 (1928) (Brandeis, J. dissenting).

The Court, therefore, has given an expansive application to the constitutional right of privacy, including -- rather than limiting and excluding -- new and unrelated areas within its protection as the occasions arise. Indeed, Mr. Justice Brandeis, a father of both the common law and constitutional privacy doctrines, 9/ concluded that the former is always included in the latter: "Every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Olmstead v. United States, 277 U.S. at 478. Although this Court need not reach such a sweeping conclusion, it is clear that the circulation of a flyer implicating the presumptively innocent respondent as a criminal is a violation of his constitutional right of privacy no matter how the right is defined. If, as one commentator has written, the basic attribute of the right of privacy is "the individual's ability to control the

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9/ See Warren and Brandeis, Right to Privacy, 4 HARV. L. REV. 193 (1890).

flow of information concerning himself" Miller, Personal Privacy in the Computer Age, 69 MICH. L. REV. 1089, 1107 (1969), there can be no greater invasion of an innocent citizen's privacy than the public circulation of his arrest record. 10/

10/ Several courts have required the government to prove a compelling interest in order to justify invasion of a person's privacy. See, e.g., Eddy v. Moore, supra; Menard v. Mitchell, supra; Griswold v. Connecticut, supra (Goldberg, J., concurring). Petitioners, however, have shown no legitimate government interest -- compelling or not -- to justify the circulation of respondent's arrest record, and defend their action with the conclusory assertion that "retail merchants have a legitimate interest in protecting their goods from theft" [Pet. Br. at 19]. However, "[t]here is a limit beyond which the government may not tread in devising classifications that lump the innocent with the guilty." Menard v. Mitchell, 430 F.2d at 492. See also, Boorda v. Subversive Activities Control Board, 421 F.2d 1142, 1149 (D.C. Cir. 1969). Since the mere fact of arrest "has very little if any probative value in showing that [a person] has engaged in any misconduct," Schware v. Board of Examiners, 353 U.S. at 241, petitioners cannot demonstrate any compelling or legitimate state interest to justify the egregious assault which they have made on Davis' privacy.

Each of the lower court cases cited by petitioners in an attempt to show that their invasion of Davis' privacy does not amount to the deprivation of a constitutional right is distinguishable from this case. In Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966), for example, the plaintiff had already been convicted of a crime when he complained that his constitutional right of privacy had been violated by the televising of his parole hearing. Here, however, Davis has never been tried for nor convicted of any crime. Nor is Rosenberg v. Martin, 478 F.2d 520 (2nd Cir. 1973), pertinent to this case, since there the police were held not to have violated any right of privacy of a fugitive by publicizing the facts of his crime, so long as the information was reasonably related to the task of locating him and taking him into custody. Tosh v. Buddies' Supermarket, 482 F.2d 329 (5th Cir. 1973), another case upon which petitioners rely, was a suit under 42 U.S.C. Section 1983 for invasion of privacy based on the circulation of mug shots and arrest records by a private, commercial organization. It was dismissed because there was no action "under color of law" as required by the statute. The court in Tosh explicitly stated that it did not decide whether "widespread publication" of information about an individual by the police would have given rise to a cause of action cognizable under Section 1983.

Baker v. Howard, 419 F.2d 376 (9th Cir. 1969), is also distinguishable. In that case, Baker sued police officers for providing, and the manager of a radio station for broadcasting, false information that Baker had committed a crime. In rejecting plaintiff's suit for invasion of privacy, the court noted that "the case involves defendants' First Amendment right of free speech and free press and for that reason calls for the exercise of restraint" [419 F.2d at 377]. Further, the challenged action in Baker involved only the brief oral publication of misleading information about the plaintiff. However large the audience or damaging the statements may have been, they were only spoken words, evanescent as the air on which they were transmitted and soon forgotten by those who heard them. Far greater an invasion of privacy is petitioners' circulation of a written document, carrying the imprimatur of the police chief, characterizing respondent as a criminal. As Mr. Justice Harlan pointed out in another context, in dealing with oral comments "one may count on . . . the likelihood that the listener will either overlook or forget what is said," as long as he does not have "to contend with a documented record." United States v. White, 401 U.S. 748, 788 (1971) (Harlan, J., dissenting).

More relevant to this case is the decision of the Ninth Circuit Court of Appeals in York v. Story, 324 F.2d 450 (9th Cir. 1963).

There the court held that police officers may be liable under the Civil Rights Act for invasion of privacy. Although the Baker Court found that there had been no invasion of privacy in that case, it affirmed the York holding that "there can be such a gross abuse of privacy as to amount to an abridgment of fundamental constitutional guarantees." In light of the damaging and lasting effects the dissemination of arrest records has on a person's employment and reputation, the action by petitioner police chiefs in this case constitutes invasion of respondent's personal freedom and is a deprivation of his constitutionally-protected right to privacy.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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MOTION FILED

MAY 28 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-891

EDGAR PAUL, CHIEF OF POLICE, LOUISVILLE DIVISION OF POLICE, AND RUSSELL McDANIEL, CHIEF OF POLICE JEFFERSON COUNTY DIVISION OF POLICE,

Petitioners,

vs.

EDWARD CHARLES DAVIS, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE KENTUCKY ASSOCIATION OF CHIEFS OF POLICE.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. and the Kentucky Association of Chiefs of Police respectfully move this Court for leave to file a brief, *amici curiae,* in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of the law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal law.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The Kentucky Association of Chiefs of Police (KACP), was founded in 1972. It is an unincorporated, not-for-profit professional association, and represents 120 chiefs of Kentucky Police departments. The KACP serves the law enforcement community and the public interest by advancing the art of professional police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

The interests of *amici* in the instant case stem from the importance of the issue involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement nationwide. The issue in this case to which *amici* address themselves is that of the limited dissemination of criminal justice information by law enforcement agencies to merchants

and private security professionals in the interests of crime prevention even though respondent in the instant case had not been convicted of the offense for which he had been arrested. The holding of the court below, if sustained, that such dissemination rises to the level of a violation of the constitutional right to due process rather than that of a common law tort, to be determined on its merits by a state court, could seriously hamper crime prevention efforts of law enforcement agencies and, as a consequence, is of extreme importance to law enforcement nationwide.

Therefore *amici* respectfully move this Court for leave to file this brief.

Respectfully submitted,

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Respondent.

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION.

ARGUMENT.

I.

IMPORTANT PRACTICAL POLICY CONSIDERATIONS MILITATE AGAINST THE ELEVATION OF THE COMMON LAW TORTS OF DEFAMATION AND/OR INVASION OF PRIVACY TO FEDERALLY PROTECTED CONSTITUTIONAL RIGHTS UNDER TITLE 42 SECTION 1983.

Amici will not reiterate the legal arguments made in the brief of the petitioner although we agree with them and wish to associate ourselves with them. We will, rather, in this brief, ad-

dress ourselves to the important policy considerations which are embodied in the instant case, considerations which we believe are of the utmost importance insofar as the effectiveness of law enforcement is concerned. We believe that this Court's decision in the instant case, should the decision of the United States Court of Appeals for the Sixth Circuit be sustained, will have an impact upon law enforcement which will far transcend the rather narrow factual situation involved.

The Circuit Court of Appeals below has elevated the common law tort of defamation to that of a federally protected constitutional right, enforceable under 42 U. S. C. § 1983 in federal courts. We recognize the fact that this Court has held that a federally protected right of privacy exists in certain *narrowly limited* instances, *Griswald* v. *Connecticut*, 381 U. S. 479 (1965); *Katz* v. *United States*, 389 U. S. 347 (1967). This Court has never held, however, that a constitutional right of privacy is enforceable in federal courts arising out of the common law tort of defamation. In fact there is considerable authority from lower federal courts that allegations of defamation do not rise to a constitutional level; *Baker* v. *Howard*, 419 F. 2d 376 (9th Cir. 1969); *Jervey* v. *Martin*, 336 F. Supp. 1350 (W. D. Va. 1972); *Travers* v. *Paton*, 261 F. Supp. 110 (D. C. Conn. 1966).

We agree with the petitioner that simple defamation cases should not be elevated by this court to federally protected rights under Title 42 U. S. C. Section 1983. We advance the following policy reasons in support of this contention.

A. There Was in the Instant Case a Legitimate Purpose for the Dissemination of Respondent's Photograph.

Before this Court takes the step of elevating what heretofore was considered to be a common law tort to a federally protected right, it is necessary to examine the purpose for which the alleged misconduct on the part of the defendant police chiefs took place.

The dissemination made in this case was, we submit, made for a totally legitimate purpose, that of making merchants in the Louisville area, and their security personnel, aware of those who had been arrested for shoplifting during the past year. The dissemination was limited to merchants and their security people in an attempt to enable them to watch for known shoplifters.

Shoplifting is a major problem in this country among retail stores. The United States Department of Commerce has estimated that losses to business establishments were 5.21 billion dollars in 1973 and 5.77 billion dollars in 1974. Of these amounts shoplifting was the leading source of business crime at 28%.[1] Regarding the proliferation of shoplifting, the report continued:

> *About four million shoplifters are apprehended each year. It is estimated that only one of every 35 shoplifters is caught. This would indicate that about 140 million instances of shoplifting occur every year. In a study conducted by a major security service firm, 500 shoppers were followed at random in a New York City department store. Forty-two, or one of every twelve, was observed stealing some item during their visit to the store.*[2]

The *Uniform Crime Reports* of the Federal Bureau of Investigation report that shoplifting crimes rose 67% between 1968 and 1973.[3]

Against this background, we submit that the efforts of the Louisville and Jefferson County Police Departments to alert the merchants of the community were clearly legitimate.

The Court of Appeals below was apparently concerned over the fact that respondent had merely been *arrested* for shoplifting, but not convicted. We readily concede that the mere

1. "The Cost of Crimes Against Business," U. S. Dept. of Commerce, Domestic and International Business Administration, Bureau of Domestic Commerce, Washington, D. C. 1974, pp. 17, 18.

2. *Ibid.*, pp. 17, 18.

3. Kelley, "Crime in the United States, 1973," *Uniform Crime Reports*, Federal Bureau of Investigation, Washington, D. C. 1973.

fact of an arrest by itself, is of less probative value than a conviction; however, the fact of an arrest is far from being of no value whatsoever. This is especially true in the case of store security personnel and retail merchants who routinely, as a part of their duties, effect searches and arrests of suspected shoplifters based on probable cause. Not every movement of a shoplifter is open and notorious; furtive motions, erratic behavior and suspicious bulges in a suspect's clothing may form the totality of observations by a security officer or merchant. When these surveillances are coupled with knowledge that the suspect has been recently arrested for shoplifting, the composite information may constitute probable cause to justify detention, questioning, a limited search or an actual arrest. Neither a record of arrests nor inconclusive observations, *by themselves,* would justify a Fourth Amendment intrusion but in combination they may well constitute probable cause.

Although a prior arrest for an offense cannot alone support a finding of probable cause for a subsequent arrest or search, this does not mean that information is irrelevant. *LeDent* v. *Wolff,* 334 F. Supp. 64, 70 (D. Neb. 1971), vac. other grds., 460 F. 2d 1001 (1972). As stated in 28 *Corpus Juris Secundum* (with reference to drugs and narcotics, but which we believe to be analogous here):

> *Matters which may be taken into account in determining whether probable cause exists for issuance of a search warrant include the past criminal record of the suspected person, his association with known narcotic users, and the fact that accused is a known user of drugs. The fact that accused has previously been charged with possession of drugs in a separate incident is not sufficient, standing alone, to show probable cause for issuance of a search warrant; but such fact is entitled to some weight when viewed with other factual allegations in an affidavit upon the basis of which a search warrant is sought.*[4]

4. 28 C. J. S., *Drugs and Narcotics,* § 134.

Since the standard upon which a finding of probable cause supportive of a search warrant is the same standard used in judging warrantless arrests an searches, it follows that information relating to recent arrests for the same crime is a relevant element in the legality of a subsequent arrest or search. Probable cause determinations are based on *all* of the facts and circumstances taken as a whole, known to the officer, at the time of the arrest or search. Otherwise inadmissible evidence, especially hearsay, is both admissible and relevant to the issue of probable cause in any suppression hearing and civil suit for false arrest or imprisonment.[5]

Speaking for two other justices in *United States* v. *Harris,* 403 U. S. 582-83, 91 S. Ct. 2081-82 (1971), the Chief Justice stated that knowledge of a suspect's reputation was not irrelevant when supported, in the affidavit, by other information, citing *Brinegar* v. *United States,* 338 U. S. 160, 174; 69 S. Ct. 1302; 1310 (1974). Continuing the Chief Justice said:

> *We cannot conclude that a policemen's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a 'legal technician' as Mr. Justice Frankfurter—is not a 'practical consideration of everyday life' upon which an officer (or magistrate) may properly rely in assessing the reliability of an informant's tip.*

Amici submit that there is a legitimate need to disseminate shoplifting arrest data to store security personnel and retail merchants. This compelling governmental interest must be weighed against any intrusions upon an individual's rights to privacy. In the case at bar, the distribution was made to private "peace officers" and merchants who exercise peace officer

5. See, in general, Annotation, *Propriety of Considering Hearsay or Other Incompetent Evidence in Establishing Probable Cause for Issuance of Search Warrant,* 10 A. L. R. 3d 359.

functions in enforcing a state statute, K. R. S. § 433.236.[6] *Amici* believe that a restricted dissemination of arrest record information to those persons who have a legitimate right and *need* to know such data is a reasonable and limited intrusion of a suspect's right to privacy, particularly in a case such as this in which it is sought to raise this right of privacy to a federal constitutional level.

B. The Opinion of the Sixth Circuit, Elevating the Tort of Defamation to a Violation of Federal Constitutional Rights, Could Impose an Intolerable Burden of Litigation Upon the Federal Courts and Upon the Police Nationwide.

1. *The Courts.*

It requires no extended citation of authority to make the point that our federal courts are experiencing enormous pressures from the burdens of litigation. The problems involved—crowded dockets, trial delays, unconscionable periods of time between the filing of cases and their resolution—have been recognized at every level of government.

The petitioners have stated in their petition for *certiorari* that:

> *To hold that the claim made by the Respondent in the case at bar amounts to a violation of his right to privacy as protected by the Constitution would open the proverbial*

6. The statute reads as follows:

433.236. Detention and arrest of shoplifting suspect. (1) A peace officer, security agent of a mercantile establishment, merchant or merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person, and that he can recover same by taking the person into custody, may, for the purpose of attempting to effect recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. (2) Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments. (Enact. Acts 1958, ch. 11, § 2; 1968, ch. 49, § 2.)

> *floodgates of litigation to virtually all types of tort actions sounding in defamation of character or invasion of privacy.*[7]

Amici believe that this is not in the slightest an overstatement of the situation. As evidence of this point we refer to a survey of police misconduct litigation taken in 1973 by the International Association of Chiefs of Police for Americans for Effective Law Enforcement, Inc., *amici* in this case.[8]

The survey showed that the number of such suits, filed in federal court, rose from an estimated 234 in 1967 to *an estimated 967* in 1971.

The opinion of the lower court, sustained in this appeal, would add to the list of allegations which could be made against the police that which they *said, wrote or disseminated.* This would place upon the federal courts, which should be the forum for redress of truly grievious violations of real constitutional rights,[9] the necessity for litigating, at the constitutional

7. Petition for a Writ of Certiorari, *Paul* v. *Davis*, No. 74-891 at page 12.

8. The survey was made of the 3,760 law enforcement agencies in this country which employed ten or more sworn officers. Data on the number of civil suits filed for police misconduct during the period 1967 to 1971 was requested by questionnaire. The survey sought data only on *misconduct* cases; therefore, suits involving motor vehicle claims, employment related actions and minor negligence matters was excluded.

1,604 law enforcement agencies employing 205,848 sworn officers replied to the questionnaires, a 42.7% response. Each questionnaire received was read over twice for obvious errors and wild scores. The results were key punched and verified. Several computer runs were made of gross scores and additional runs were made eliminating blank and zero responses.

Among the purposes of the survey was to obtain data, based both on actual responses received and computer projections of national totals of the numbers, *and increases* in the number of police misconduct cases filed in the five year period 1967-1971.

It is readily apparent that police misconduct suits in federal courts proliferated at an enormous rate during the survey period. Misconduct cases increased by 413; and these suits were those involving actual *misconduct* affirmative action by the police, perhaps taken in good faith, but affirmative conduct nevertheless.

9. See, e.g. *Monroe* v. *Pape*, 365 U. S. 167 (1961).

level, any number of cases which now sound in the torts of defamation and/or invasion of privacy.

If the manner in which police misconduct suits have proliferated in recent years, as indicated by the above mentioned survey, is any guide, the numbers of "defamation" and "privacy suits" newly elevated to a constitutional dimension would increase the burden on the federal courts manyfold.

We do not believe that the federal courts should be glutted with all types of tort claims which have historically been, and properly are, the province of the states.[10] *Only* those cases in which a deprivation of real constitutional rights is alleged or proved should be in the domain of the federal courts. The impact of such cases should not be diluted by providing that every allegation of a tortious act by a policeman is a federal case.

2. *The Holding by the Lower Court Is so Broad That Police Officials, Such As the Defendants in This Case, Would Be Unable to Know What Information They Could Use and Disseminate for Legitimate Law Enforcement Purposes.*

The ruling of the Court of Appeals below should be reversed because it is couched in such broad terms that the long range adverse effect of the ruling could be incalculable. The court below characterized the limited dissemination to local merchants of the names and pictures of known shoplifters, including respondent, by the defendant police chiefs as "branding" respondent with a "badge of disgrace,"[11] because he had not been convicted of the crime of shoplifting. It continued:

10. As this Court has stated:

> . . . the protection of a person's *general* right to privacy—his right to be left alone by other people—is like the protection of his property and his very life, left largely to the law of the individual states. *Katz* v. *United States*, 389 U. S. 347 (1967).

11. Petition for a Writ of Certiorari, *Paul* v. *Davis*, No. 74-891 at page 26.

> The harm is all the more apparent because the branding had been done by law enforcement officials with the full power, prestige and authority of their positions. There can be little doubt that a person's standing and association in the community have been damaged seriously when law enforcement officials brand him as an active shoplifter, accuse him of a continuing course of criminal conduct, group him with criminals and distribute his name and photograph to the merchants and businessmen of the community.[12]

This broad statement appears on its face to be a blanket prohibition against law enforcement officials, at the risk of liability for violation of federal constitutional rights, from making any dissemination of criminal justice information, which did not result in a conviction, to selected members of the community, no matter how relevant the information and no matter how legitimate the purpose of the dissemination.

In fact, we submit that the cited language of the lower court is sufficiently broad in its scope as to raise the possibility that it could be interpreted to prohibit the dissemination of non-conviction information even among law enforcement agencies themselves. For the prohibition imposed against dissemination by law enforcement officials to the merchants for the totally legitimate purpose of helping them prevent shoplifting and to identify and apprehend shoplifters could, by extension, be held to prohibit such a dissemination from one police department to another for an equally legitimate purpose: the identification and apprehension of other criminals.

Such a state of events would be disastrous to the effectiveness of law enforcement. Courts have long recognized the need for the maintenance and exchange of information among criminal justice agencies, *Laird* v. *Tatum*, 408 U. S. 1 (1972); *Fifth Avenue Peace Parade Committee* v. *Graf*, 480 F. 2d 326 (2d Cir. 1973), Cert. den., sub. nom. *Fifth Avenue Peace Parade Committee* v. *Kelley*, 94 S. Ct. 1469 (1974). In the latter case

12. *Ibid.* at p. 27.

the court upheld dissemination of intelligence information by the FBI to law enforcement agencies saying that:

> . . . the distribution here . . . was appropriate in view of the responsibility of the various official agencies made privy to the reports. 480 F. 2d at 333.

See also: *Rogers* v. *Slaughter*, 469 F. 2d 1084 (5th Cir. 1972); *Herschel* v. *Dyra*, 365 F. 2d 17 (7th Cir. 1966).

The opinion of the court below could cast the gravest doubt as to the continued ability of law enforcement agencies to retain and disseminate non-conviction information because of the risk of federal civil liability under the "branding" theory enunciated by the lower court.

Even if the lower court opinion is to be interpreted more narrowly, that is, that it applies only to dissemination of non-conviction information by law enforcement agencies to selected members of the community, the decision would still have an adverse effect upon the law enforcement picture generally.

There are members of the community who, while they are not public law enforcement officers themselves, have a very real and legitimate need to know if criminally inclined individuals are encroaching upon their sphere of activity. The instant case is a case in point. As was discussed in subsection A of this argument, the problem of shoplifting has reached such proportions for merchants and their security personnel that it is absolutely essential that they be made aware of the identity of potential shoplifters and the obvious persons to make them so aware are law enforcement agencies.

Other examples of instances in which selected individuals in various areas of activity need to receive criminal justice information from law enforcement officers include:

1. race track security officials in cases of known gambling offenders or organized crime figures;

2. hospital or pharmacy security officials in cases of known drug offenders;

3. securities brokers and bank security officials in cases of known stock fraud operators or embezzlers;

4. school security officials in cases of known sex offenders or child molesters;

5. security officials of public utilities such as gas, light, power and telephone companies, whose employees are credentialed to enter people's homes in cases of known burglars, robbers or rapists.

This listing is not exhaustive but it does present a picture of the very real necessity of a limited exchange of information between law enforcement officials and segments of the public. Finally, the point was made in the lower court opinion that since the respondent had not been convicted, the dissemination of the information in the instant case flies in the face of the presumption of innocence. Reasonable men do not quarrel with this presumption but it must be borne in mind that it *is* only a presumption.

In an ideal criminal justice system wherein each criminal proceeding resulted in the determination of the real truth as to the guilt or innocence of the accused, a rule of "no-dissemination-without-a-conviction" might be eminently sensible. Unfortunately, the criminal justice system in the United States bears no resemblance to such an ideal system. The fact of the matter is that in many instances the truth as to the actual or apparent guilt of a suspect in our system is for one reason or another suppressed.

For example, a person arrested for a crime whose guilt is at least highly probable may escape conviction because:

1. Physical evidence against him must, under the Exclusionary Rule, be suppressed. A suspected murderer found in possession of the murder weapon; a suspected rapist found in possession of the victim's bloody underclothing; an alleged robber or burglar found in possession of the fruits of the crime; or suspected heroin dealer found in possession of heroin all may

have to be freed because the items found must be suppressed if the police, in searching for or seizing such evidence, are found to have violated his Fourth Amendment rights in any manner.

2. Confessions made by the perpetrators of crimes—often the only evidence of their guilt—must be suppressed if the police, in obtaining the confession, ran afoul of the extremely rigid requirements involving the admissibility of confessions in the decision of the United States Supreme Court in *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

3. Witnesses, and often victims, refuse to testify against the accused because:

(a) they are terrified into silence

(b) they are killed

(c) they are discouraged by the interminable delays involved in bringing an accused to trial.

(d) in such crimes as rape and molestation cases, the victims refuse to expose themselves and their family to the trauma of going through with a criminal prosecution.

4. Individuals are freed on such grounds as insanity, "Dimished capacity" etc.

These are but a few examples of the manner in which, while the suspect has not been in fact convicted, the practical realities of the situation dictate that his guilt is at least as likely as his innocence. Thus, the lower court's apparent prohibition, under the threat of federal civil liability, of *any* dissemination of non-conviction information by law enforcement agencies to those who have need for such information is sustained would have an obvious adverse impact on the criminal justice system.

CONCLUSION.

We do not call, in this brief, for a sort of carte blanche immunity for law enforcement agencies and individuals to make public disclosures of sensitive information about citizens whenever it pleases them. We do believe that in the instant case the limited dissemination was justified, that the police should not be prohibited from making such limited disseminations, that the decision of the court below is far too broad and that its adverse impact on law enforcement and the protection of society is totally out of proportion to any protection of individual rights involved, and that the policy considerations raised herein militate against the elevation of the common law torts of defamation and/or invasion of privacy to a federally protected constitutional right under 42 U. S. C. § 1983.

For these reasons we respectfully urge the Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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